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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SHEARN MOODY, JR.,

Petitioner,

v.

DAVID C. MEYERS, ET AL.,

Respondents.

APPENDIX TO PETITION FOR CERTIORARI

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APPENDIX A

United States Court of Appeals

FIFTH CIRCUIT.

No. 80-1145.

DAVID C. MEYERS, *et al.*,
Plaintiffs-Appellees,

v.

SHEARN MOODY, JR.,
Defendant-Appellant,

BERNARD HAINES, *et al.*,
Plaintiffs-Appellees,

v.

SHEARN MOODY, JR.,
Defendant-Appellant,

THARPE FORRESTER,
Receiver-Appellee,

v.

SHEARN MOODY, JR.,
Defendant-Appellant,

(DEC. 23, 1982)

Appeal from the United States District Court for the Northern District of Texas.

Before THORNBERRY, REAVLEY and JOHNSON, Circuit Judges.

The receiver ("Receiver") of Empire Life Insurance Company of America ("Empire") brought this action against Empire's president, board chairman and majority

shareholder, Shearn Moody, Jr. ("Moody"), alleging that Moody violated both federal securities law and his fiduciary duties in the management of Empire's affairs. The jury verdict and district court judgment, 475 F.Supp. 232 (D.C. Ala. 1973), went against Moody on both securities and common law grounds. Moody appeals and we affirm.

In the summer of 1963 Empire was a fledgling company licensed in a single state, with no business, one employee, $256,000 of capital and surplus and no other assets. By the end of 1968 Empire was licensed in sixteen states, with approximately $455,000,000 of business in force, 500 full-time agents, $20,000,000 in reported surplus and $60,000,000 in reported assets. This phenomenal growth was made possible by Moody's assignment to Empire of 40 percent of his life estate in a trust established by his grandmother.[1] The life interest was admitted as an asset of Empire at a value of $5,813,440 in 1964, $14,403,200 in 1965, and $4,250,000 in 1972. When the life interest's assigned value increased, Empire prospered; when its value declined, Empire collapsed.

[1] A critical factual issue has been the designation of responsibility for the $14,403,200 value placed on the life interest. Moody claimed that responsibility rested with national accounting firms, an independent actuary and the Alabama Superintendent of Insurance. The jury found that the value increase was done by Moody as part of a scheme to defraud. As will be seen, that finding is supported by the evidence. Other facts and legal issues, however, must be faced to dispose of the appeal.

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[1] This 40 percent of Moody's life estate in his grandmother's trust will hereafter be referred to as "the life interest."

I.

FACTUAL BACKGROUND: THE RISE AND FALL OF EMPIRE[2]

In 1943 the Libbie Shearn Moody Trust was created for the benefit of certain heirs, including Shearn Moody, Jr. The corpus of the trust consisted chiefly of 9,949,585 shares of stock in American National Insurance Company ("ANICO"), and ANICO dividends produced approximately 90% of the trust's income. Moody inherited a one-eighth life interest in this trust.

On June 27, 1963, Moody incorporated Empire Life Insurance Company in the State of Alabama. Moody, the company's sole shareholder, contributed $256,061 to Empire. Such meager capital could not support Moody's ambitious plan — to amass quickly as many assets as possible by acquiring other life insurance companies, which are required by law to have substantial assets in reserve to pay policyholder claims. To embark upon an acquisition program Empire needed a substantial surplus.

Empire acquired that surplus in July 1963 when Moody assigned to it 40 percent of his interest in the Libbie Shearn Moody Trust in consideration for a $200,000 surplus debenture. Moody and Dale R. Major, Moody's lawyer and chief assistant, intended and believed that the instrument assigning the life interest precluded its further transfer; but Moody never communicated this thought to any insurance commissioner, Empire director, or Empire shareholder, despite (or because of) the fact that an asset which cannot be transferred cannot be admitted as an asset of an insurance company.

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[2] The following synopsis of facts is stated most favorably to the jury verdict, and hence the plaintiff. *See Quinn* v. *Southwest Wood Products, Inc.*, 597 F.2d 1018, 1019 (5th Cir. 1979).

Before the life interest could be used to support Empire's expansion, it was necessary that the Alabama Superintendent of Insurance "admit" the interest as an asset of Empire at an approved value. To determine the interest's value, Moody employed the actuarial firm of Lloyd K. Friedman & Associates and the national accounting firm of Ernst & Ernst. In the spring of 1964 Lloyd Friedman furnished Henry Hogan, a partner in Ernst & Ernst, with a suggested method of calculating the life interest's value. This method took into consideration an actuarial factor (Moody's life expectancy) and three economic factors (current trust income, future increases in trust income, and future interest rates), the objective being to arrive at the present value of predicted income from the trust. Hogan accepted Friedman's valuation method, as well as his assessment of Moody's life expectancy and current trust income. Hogan himself selected what he considered the most reasonable growth rate and discount rate. In determining the applicable growth rate, Hogan noted that ANICO's cash dividends had increased at an average annual rate of nearly 40 percent over the previous twelve years. Hogan expressly took this increase into account in concluding that it would be most reasonable to assume a 5 percent growth rate in trust income. In determining the applicable discount rate to apply to future income, Hogan considered but rejected a 4 percent rate in favor of a 5 percent rate.[3] In a letter dated September 1, 1964, Hogan informed Moody that, based on the valuation method and assumptions set forth above, the life interest owned by Empire should be valued at $5,813,440.

At Moody's request, Lloyd M. Jard, a partner in the accounting firm of Peat, Marwick, Mitchell & Co., ("Peat

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[3] The higher the discount rate, the lower the present value of the life interest.

Marwick") transmitted a copy of Hogan's letter to Walter S. Houseal, Superintendent of Insurance for the State of Alabama. On October 27, 1964, Superintendent Houseal informed Empire that the Alabama Insurance Department accepted the life interest as an admitted asset of Empire at a value of $5,813,440. Houseal stipulated, however, that acceptance of the life interest at this or any other value would continue only so long as the Department received each year an updated appraisal of the life interest "prepared by Ernst & Ernst or other competent appraiser." Empire listed the life interest as an admitted asset at a value of $5,813,440 in its December 31, 1964 report to shareholders.

The $5,813,440 valuation of the life interest provided Empire with the surplus necessary to consummate a merger with Consolidated American Life Insurance Company ("CALICO"), a publicly held corporation. On December 31, 1964, Empire issued 345,103 shares of Class A common stock for all of CALICO's outstanding common stock. Although Empire acquired minority shareholders as a result of this merger, Moody retained virtually all of the company's Class B voting stock, as well as the ability to elect all but one of its directors.

The CALICO merger so depleted Empire's surplus that the rapid expansion program envisioned by Moody was placed in jeopardy. Thus, within six months of Superintendent Houseal's approval of the life interest at a value of $5,813,440, Moody undertook a series of actions that resulted in an increase in excess of $8,000,000 in the life interest's admitted value.

In a letter dated March 8, 1965, Dale Major, who was by now executive vice-president and secretary of Empire, informed Houseal that ANICO had recently announced a dividend increase of two cents per share. Major continued:

> Our accountants have been apprised of the [dividend increase], and have been instructed to prepare immediately a current evaluation based on this increased dividend. As soon as this appraisal is received it will be forwarded to you.

About the same time, Moody asked Lloyd Friedman to recalculate the value of the life interest based on new economic variables. In a letter dated March 31, 1965, Friedman responded by setting forth in summary fashion alternative valuations of Moody's entire one-eighth life estate as of December 31, 1964. Friedman's calculations assumed current annual income of $400,000, a discount rate of 4%, and alternative growth rates of 5%, 7½% and 10%. An assumed growth rate of 5% yielded a $19,488,000 valuation of Moody's entire life estate; a 7½% assumed growth rate yielded a $36,000,000 valuation; and a 10% assumed growth rate yielded a $73,908,000 valuation. Friedman offered no opinion as to which, if any, of these assumed growth rates were reasonable.

Friedman's response did nothing more than apply arithmetic to the obvious fact that the value of the life interest owned by Empire could be substantially increased if the three critical economic assumptions on which Ernst & Ernst had based its appraisal were altered. Specifically, the life interest's value would rise from $5,813,440 to $14,403,200 if the appraiser assumed (a) current annual income of $400,000, rather than $370,000, (b) a growth rate of 7½% rather than 5%, and (c) a discount rate of 4% rather than 5%.

Immediately after receiving Friedman's letter, Moody provided Empire's accountant at Peat Marwick with the new computations. On April 2, 1965, Peat Marwick transmitted to Moody a statement of Empire's assets and liabilities as of December 31, 1964. In an accompanying letter,

the accounting firm stipulated that the financial statement was "prepared without audit or verification by us from data you made available, . . . [including] a computation by an independent actuary of the company's life interests in the Libbie Shearn Moody Trust." The statement listed the life interest as an admitted asset with a value of $14,403,200. Noting the discrepancy between this valuation and the $5,813,440 valuation appearing in Empire's December 31, 1964 report to shareholders, the firm stressed that it had not inspected any report which might underlie the actuary's computations.

At about this time, Moody and Major met with Superintendent Houseal during a convention of the National Association of Insurance Commissioners in Miami. Moody and Major informed Houseal that they intended to seek a revaluation of the life interest, and that studies had been made which indicated the life interest was worth approximately $14,000,000.

On April 8, 1965, Lloyd Jard of Peat Marwick transmitted to Superintendent Houseal, at Moody's request, a copy of Friedman's letter setting forth alternative valuations of the life interest. Houseal apparently also received a copy of Peat Marwick's unaudited financial statement, as well as another copy of Friedman's letter containing the following addendum: "Two-fifths of the trust valuation at $36,008,000.00 is equivalent to the $14,403,200.00 appearing in the Peat, Marwick & [*sic*] Mitchell & Co. financial report dated December 31, 1964."

Major testified that a formal valuation hearing was held in the spring of 1965 before Superintendent Houseal and that Houseal then accepted a $14,403,200 valuation of the

life interest.[4] No written record of either this hearing or its findings was introduced.

Immediately following Houseal's approval of the increased valuation of the life interest, Empire embarked upon an aggressive acquisition program. In the last six months of 1965 the company's size more than doubled. In June, Empire made a stock-for-stock acquisition of the Empire Life Insurance Company of America (Little Rock, Arkansas).[5] In November, the company paid cash for a controlling interest in the National Insurance Company of America. These developments were noted in Empire's December 31, 1965 report to shareholders. The annual report also listed the life interest as an admitted asset at a value of $14,403,200 and stated:

> Valuation of the trust was calculated by the national accounting firm of Ernst & Ernst, and actuaries including Mr. Lloyd K. Friedman, F.S.A., consulting actuary of Houston.

Moody now concedes that this statement was inaccurate and that Ernst & Ernst did not review the 1965 revaluation.

Empire's expansion program continued in 1966 with the stock-for-stock acquisition of National Empire Life Insurance Company. Despite this extraordinary growth, no state undertook to review the company's financial affairs until the fall of 1966. At that time insurance examiners

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4. Evidence was presented at trial that tended to prove that Houseal might have been swayed by considerations of friendship and obligation in approving the increased valuation of the life interest. Major and Houseal were friends; indeed, Major recommended Houseal for the position he accepted after stepping down as Superintendent of Insurance. Moreover, Houseal had visited Moody's Texas ranch on several occasions at Empire's expense.

5. At the time of this merger the words "of America" were added to Empire's name.

for the states of Alabama, Texas and Arkansas reviewed Empire's financial condition as of December 31, 1965. The examiners, apparently non-plussed by the sudden and substantial increase in the value of the life interest between 1964 and 1965, consulted Superintendent Houseal for an opinion. Following a meeting with Houseal in October of 1966, the examiners drafted a report that concluded with this curiously limited certification: "The customary insurance examination procedures . . . have been followed in connection with the verification and evaluation of the *liabilities* shown in the financial statement of this report" (emphasis added).

On the surface, 1968 was a banner year for Empire. The company's assets increased over 50 percent in that year alone, and the number of subsidiaries under Empire's effective control or under common control with Empire expanded from nine to thirty-one. Empire acquired control of Universal American Life Insurance Company in January, Capital Security Life Insurance Company in April, Investors Preferred Life Insurance Company in May, Centennial Reserve Life Insurance Company in June, and National Investor's Life Insurance Company (a complex of twenty-eight companies, including twelve life insurance companies) in August. In addition, Empire entered into reinsurance agreements with Reliance Life & Accident Insurance Company of America in January, Republic Investors Life Insurance Company in April, American Trust Life Insurance Company in June, and Investors Preferred Life Insurance Company in December.

Although Empire touted its rapid expansion program as a sign of the company's robust health, the true effect of the program was to render the company perilously close to collapse. The aggregate impact of the acquisitions was to drain Empire of its liquid assets. Cash might be obtained

so long as the life interest was admitted as a $14,403,200 asset of the company. A significant devaluation of the life interest, however, would end the ride.

In the following year just such a devaluation was threatened. In December 1968, R. Frank Ussery had replaced Walter Houseal as Alabama's Superintendent of Insurance. By then, the insurance commissioners of several states in which Empire did business had become sufficiently doubtful of the value assigned the life interest that they commissioned the American Appraisal Company to conduct a formal appraisal. In February 1969, American Appraisal reported that as of September 30, 1968, the life interest had a value for continued use of $8,600,000 and orderly liquidation value of $4,250,000. At about the same time, examiners for the states of Texas, Arkansas and Alabama issued an unofficial report of examination as of December 31, 1968, assigning the life interest a value of zero.[6]

In response to these reports, Superintendent Ussery ordered Empire to cease writing new insurance policies and to engage in no further acquisitions and mergers. In June 1969, Ussery accepted a proposal made by Moody whereby Empire would gradually diminish the life interest's net asset value from $14,403,200 to an eventual value of zero. (Empire did not, however, devalue the life interest as agreed.) At the same time, a panel composed of Ussery and four other state insurance commissioners was formed to attempt to rehabilitate the company. The panel met with little success: Empire sustained net operating losses of $1,734,700 in 1969 and in 1970 was temporarily forced to delay payments of claims due to lack of cash revenues.

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6. To quell doubts about the $14,403,200 valuation, Moody hired Richard P. Johnson, an economics professor at Southern Methodist University, to undertake a valuation of the life interest. In November 1968, Johnson reported that the life interest's value as of December 31, 1968 would be no lower than $16,000,000, and that a reasonable valuation was $23,000,000.

In January 1971, John G. Bookout replaced Frank Ussery as Alabama's Superintendent of Insurance. Upon learning that no official report of Empire's financial condition had been issued in five years, Bookout ordered that a pending examination be promptly completed. In December 1971, examiners for the states of Alabama, South Dakota and Texas submitted their report of Empire's affairs as of December 31, 1970. The examiners assigned the life interest a value of $4,250,000, in accordance with the fair market valuation by American Appraisal, and found that Empire was statutorily insolvent in excess of $6,000,000 and impaired in excess of $10,000,000.

In April 1972, after reviewing the results of the examination, Superintendent Bookout instituted a receivership proceeding in Alabama court against Empire. Two months later, after a three-week hearing largely devoted to the proper valuation of the life interest, the trial court placed Empire into receivership. The court appointed Superintendent Bookout as receiver and authorized him to solicit offers from other insurance companies for the reinsurance of Empire. At about the same time, the states of Texas, Arkansas and Montana also placed Empire into receivership.

In January 1974, the Alabama receiver sought an order of liquidation of Empire and approval of a bulk reinsurance agreement presented by Protective Life Insurance Company ("Protective"). After another extensive hearing, the receivership court found that Empire was statutorily insolvent in excess of $6,000,000 and impaired in excess of $10,000,000, and that the company's financial condition was "rapidly deteriorating." On June 14, 1974, the court entered an order granting the receiver's petition to liquidate and reinsure the business of Empire into Protective.

In June 1974, Receiver filed a complaint against Moody in United States District Court for the Northern District of Texas[7] alleging that in his management of Empire Moody had violated his fiduciary duties of care and loyalty as well as § 10(b) of the Securities Exchange Act of 1934. The case was tried before a jury in December 1976. In response to special interrogatories, the jury found that Moody had violated both his common law duties to Empire and the federal securities laws. On May 29, 1979, the trial court entered judgment against Moody for actual damages of $5,319,000 and punitive damages of $1,000,000, together with accrued interest. *Meyers* v. *Moody*, 475 F.Supp. 232 (N.D.Tex. 1979). This is an appeal from that judgment.

II.

THE LEGAL ISSUES

A. *Preliminary Matters*

1. *Standing*

Moody first complains that plaintiff Receiver, appointed under the laws of Alabama, lacked standing to bring suit in a court outside the state of his appointment.

[2] The capacity of a receiver to sue in federal court is governed by the law of the forum state. Fed.R.Civ.P. 17(b); Wright & Miller, Federal Practice and Procedure § 1567 (1971). The controlling case in Texas is *Carpenter* v. *Pink*, 133 Tex. 82, 124 S.W.2d 981 (1939). In that case a New York court placed an insolvent New York corporation in the hands of the New York Insurance Commissioner.

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7. On March 21 and May 5, 1972, Empire shareholders had filed derivative suits against Moody. These suits were subsequently consolidated. Receiver joined in the consolidated derivative action as plaintiff, and the shareholders' derivative action was abated and ultimately dismissed, leaving only Receiver's derivative action.

At the Commissioner's request a Texas ancillary receiver was appointed to preserve the company's assets in Texas. In a subsequent suit brought in Texas court, the Texas receiver disputed the New York Commissioner's authority under Texas law to prosecute an appeal. The Supreme Court of Texas held that the Commissioner was entitled to prosecute the appeal because he was lawfully a party to the suit in the court below. The court stated:

> We are aware of the general rule that an administrator appointed in one state cannot sue in another, and an ordinary equity receiver appointed by a State court has no extraterritorial powers, but such rule cannot be applied here.... [T]he New York receiver ... did not derive his powers, authority, and title from the decrees of the appointive court, but from the laws of the state which created or chartered this corporation.... [S]ince the State of New York created this corporation, it had the lawful right to say, by statute, who [the corporation's] agents should be ..., both while this corporation was a solvent and going concern, and after it had been declared insolvent.... For us to refuse to recognize the New York Insurance Commissioner as a party to this suit under the facts of this record would be to deny full faith and credit to the statutes and judicial decrees of the State of New York.

Id. 124 S.W.2d at 987 (citations omitted).

[3] Since Empire Life Insurance Company was created by the laws of Alabama, Alabama had the right to designate its agent in insolvency. The receiver in this case, like the receiver in *Carpenter,* derived his authority not from the decrees of the appointive court but from the laws of the appointive state. Alabama Code § 27-32-15 provides in pertinent part:

> As a domicilary receiver, the commissioner shall be vested by operation of law with the title to all of the property, contracts and rights of action . . . wherever

> located, as of the date of entry of the order directing him to rehabilitate or liquidate a domestic insurer . . . .

The Alabama receiver accordingly had standing to bring suit in United States District Court for the Northern District of Texas.

[4] Moody also argues that Receiver did not have standing to sue on behalf of Empire's shareholders, policyholders or creditors. The law in Texas is to the contrary. In *Cotten* v. *Republic National Bank of Dallas*, 395 S.W.2d 930 (Tex.Civ.App.—Dallas 1965, writ ref'd n.r.e.), the court stated:

> Certainly a receiver for an insolvent insurance corporation . . . has a right to maintain a suit which is necessary to preserve the corporation's assets and to recover assets of which the corporation has been wrongfully deprived through fraud. In such a suit the receiver may be said to sue as the representative of the corporation and its creditors, stockholders and policyholders. . . .

Id. at 941. Moody's challenges to plaintiff's standing are without merit.

2. *Statute of Limitations*

The events which form the basis of Receiver's state and federal claims occurred more than three years before this suit was commenced. The increased valuation of the life interest occurred in 1965; the acquisition program which that valuation made possible was concluded in December 1968; and the present action was brought in March 1972. Moody argues that Receiver's suit is accordingly barred by applicable statutes of limitations.[8]

[5] State law determines when a state law cause of action accrues, *see Walko Corp.* v. *Burger Chef Systems*,

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[8] Receiver's state law claims are governed by a two-year limitations period. *See* Tex.Rev.Civ.Stat.Ann. art. 5526(4) (repealed

Inc., 554 F.2d 1165, 1171 (D.C. Cir. 1977). Under state law, a cause of action based on fraud accrues only when the fraud is discovered or by the exercise of reasonable diligence should have been discovered. *Gaddis* v. *Smith*, 417 S.W.2d 577 (Tex. 1967). Whether a plaintiff has exercised the degree of diligence necessary to toll the statute of limitations is a question of fact. *Cotten* v. *Republic National Bank of Dallas*, *supra*, at 946; *L.C.L. Theatres* v. *Columbia Pictures Industries, Inc.*, 566 F.2d 494, 497 (5th Cir. 1978).

Moody argues that all causes of action in the present case accrued upon the conclusion of Empire's acquisition program in 1968, because by that time Empire's disinterested shareholders and directors and the various insurance commissioners involved had knowledge of facts from which they could have inferred the existence of any common law violations. The jury, however, found in response to special interrogatories that Moody concealed material facts from all these persons, and that reasonable diligence would not have alerted them to Moody's wrongful acts before March 1971.

[6] The jury's findings are supported by the evidence. Empire's shareholders were explicitly informed in Empire's 1965 annual report that the $14,403,200 valuation of the life interest was calculated by Ernst & Ernst and by actuaries including Lloyd Friedman; every subsequent report to shareholders until 1972 continued to assign the life interest a $14,403,200 value.[9] Three of Empire's directors, Hilton

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effective August 27, 1979); *White* v. *Bond*, 362 S.W.2d 295 (Tex. 1962). In light of our disposition of the 10b-5 issue, *see* section (II)(B)(2), *infra*, we need not decide the applicable limitations period for that claim and whether it was tolled.

9. Absent cause to question them, it is reasonable for shareholders to rely on the knowledge and integrity of the corporate managers with respect to shareholder reports. *De Haas* v. *Empire Petroleum Co.*, 435 F.2d 1223, 1227 (10th Cir. 1970).

Painter, Frank Schmidt and Richard Linn, testified at trial that they were led to believe the increased valuation was based upon an appraisal by an accounting or actuarial firm. R. Frank Ussery, Alabama's Superintendent of Insurance from December 1968 to January 1971, testified that he, too, believed the increased valuation was based on assumptions provided by an accounting or actuarial firm. The jury could reasonably have found that the reliance of these persons on Moody's representations was justified, and that their diligence was sufficient to toll the statute of limitations.

3. *Equitable Estoppel*

In April 1975, three years after the present action against Moody was initiated, Receiver entered into an agreement to effectuate a bulk reinsurance treaty with Protective Life Insurance Company of America ("Protective"). Under this treaty Protective acquired virtually all of Empire's assets and liabilities. Receiver retained Empire's right of action against Moody, but agreed to pass along to Protective any recovery obtained from Moody. Since Empire's liabilities exceeded its assets, Protective stipulated that it would reinsure only those Empire policyholders who accepted a ten-year moratorium on the right to receive the cash values of their policies. Protective and Receiver agreed that any recovery against Moody would inure to the benefit of those policyholders by reducing the moratorium amount established under the treaty.

Moody contends that Protective is the real plaintiff in interest under these facts, and that any recovery against Moody would unjustly enrich Protective in violation of the equitable principles enunciated in *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook Railroad,* 417 U.S. 703, 94

S.Ct. 2578, 41 L.Ed.2d 418 (1974). In *Bangor Punta* the Amoskeag Company ("Amoskeag") purchased virtually all the stock of the Bangor & Aroostook Railroad ("BAR"). BAR subsequently sued its former owner for corporate waste and mismanagement. The Supreme Court held that equity precluded BAR from maintaining the action, reasoning that although the suit was purportedly brought on BAR's behalf, the real party in interest and the principal beneficiary of any recovery was Amoskeag. Since the depressed price Amoskeag had paid for BAR's stock already reflected the effects of the earlier mismanagement, any recovery would constitute a "windfall" for Amoskeag.

Bangor Punta is distinguishable from the present case in several respects.

First, Protective in this case, unlike Amoskeag in *Bangor Punta,* cannot fairly be considered the principal beneficiary of any recovery against the injured corporation's former owner. Although Protective might benefit derivatively from such recovery, the principal beneficiaries under the express terms of the reinsurance agreement are the policyholders of Empire. These policyholders are Empire's creditors, and have suffered direct injury as a result of Moody's improprieties. By contrast, the Supreme Court in *Bangor Punta* stressed that Amoskeag was not suing on behalf of the injured corporation's creditors, 417 U.S. at 718 n. 15, 94 S.Ct. at 2587 n. 15, and had not itself suffered any injury, 417 U.S. at 711-12, 94 S.Ct. at 2583-84.

Second, even if Protective were the principal beneficiary of any recovery in this case, it still could not fairly be considered the beneficiary of a "windfall." The Supreme Court's finding in *Bangor Punta* that any recovery against BAR's former owner would constitute a windfall for Amoskeag turned on the fact that Amoskeag received all it had bargained for when it acquired BAR's

stock. In the present case, however, Protective did *not* receive all it had bargained for when it acquired Empire's assets since it had sought and obtained an agreement that any recovery against Moody would be applied to reduce the policyholder's moratorium. Far from being an unexpected gain, a recovery against Moody was clearly contemplated by Protective and provided for in its reinsurance agreement with Receiver.

[7] Finally, in *Bangor Punta* there was no lawsuit, and there could have been no lawsuit, until Amoskeag acquired BAR's stock. By contrast, Empire initiated this action against Moody several years before Protective acquired Empire's assets. Moody is thus urging us to *extinguish* a cause of action that both existed and was pursued long before the transfer of Empire's assets took place. Neither law nor equity permits us to do so. Empire suffered a cognizable injury for which a remedy exists. To hold that the remedy abates because the corporation's assets were sold would result in inequity that the Court in *Bangor Punta* sought to avoid, and would make Moody himself the beneficiary of a windfall. *See National Union Electric Corporation* v. *Matsushita Electric Industrial Co.*, 498 F.Supp. 991, 1003 (E.D.Pa.1980). Receiver is not equitably estopped from bringing this action under the principles enunciated in *Bangor Punta*.[10]

[8-10] Moody also argues that Receiver is equitably estopped from bringing this action because Moody

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[10] It bears noting as well that *Bangor Punta* involved a transfer of stock rather than assets. Moody cites no case, and we have found none, in which *Bangor Punta* is applied to preclude recovery by a plaintiff who has acquired a corporation's assets rather than its stock. This is hardly surprising, since the transferee of a corporation's assets has no right of action against the corporation's prior owners for mismanagement unless the transfer agreement gives it such a right – in which case any recovery would not constitute a "windfall."

increased the value of the life interest and pursued the subsequent acquisition program in reliance on the approval issued by Empire's shareholders and board of directors and the Alabama Department of Insurance. The sole virtue of this contention is audacity. The doctrine of estoppel is for the protection of innocent persons, and only the innocent may invoke it. A party may not invoke an estoppel for the purpose of shielding himself from the results of his own fraud, dereliction of duty, or other inequitable conduct. *El Paso National Bank* v. *Southwest Numismatic Investment Group, Ltd.*, 548 S.W.2d 942, 949 (Tex. Civ. App. — El Paso 1977, no writ). Moreover, a party invoking estoppel must be ignorant of the facts which the party to be estopped is alleged to have represented by his conduct or silence. *Investors Realty Trust* v. *Carlton Corp.*, 541 S.W.2d 289, 292 (Tex. Civ. App. — Dallas 1976, no writ); *Clifton* v. *Ogle*, 526 S.W.2d 596, 603 (Tex. Civ. App. — Fort Worth 1975, writ ref'd n.r.e.). Moody is in no position to invoke an estoppel against Receiver.

B. *Liability*

1. *Common Law*

a. *Applicable Law*

[11] A threshold issue concerns the law to be applied in determining the nature and extent of Moody's fiduciary obligations to Empire. We apply the conflict of law principles of Texas (the forum state) in resolving this issue. *Klaxon Co.* v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Specifically, we look to the Texas Business Corporation Act (the "Act"), which was enacted in 1955 and in force at all times relevant to this lawsuit.

[12] Tex.Bus.Corp.Act Ann. art. 9.14(A) (Vernon) provides that the Act does not apply to foreign corporations which are granted authority to transact business within

the state under any special statute, except that, where the special statute contains no provision regarding matters provided for in the Act with respect to foreign corporations, the Act applies to the extent it is not inconsistent with the special statute. Insurance companies are among those foreign corporations authorized to transact business in Texas under a special statute. *See* Tex.Ins.Code Ann. art. 3.57, 21.43 (Vernon). The Texas Insurance Code nowhere specifies the duties or liabilities of officers or directors of insurance companies. The Texas Business Corporation Act, on the other hand, provides that officers and directors of a foreign corporation doing business in the state are subject to the same duties and liabilities as are imposed upon officers and directors of domestic corporations. Tex. Bus.Corp.Act Ann. art. 8.01, 8.02; *see* Model Business Corporation Act § 99 par. 1 ¶ 2.02(3) (1960). Nothing in the Texas Insurance Code is inconsistent with this provision. We conclude that Moody was subject to the same duties and liabilities that Texas law imposes upon officers and directors of Texas corporations.

b. *Breach of Duty of Care*

[13, 14] Texas law imposes on corporate officers and directors a duty to exercise due care in the management of the corporation's affairs. If they breach that duty, they are liable to the corporation for any loss it may suffer as a result of their neglect. *See Sutton* v. *Reagan & Gee,* 405 S.W.2d 828, 834 (Tex.Civ.App.—San Antonio 1966, writ ref'd n.r.e.); *Fagan* v. *La Gloria Oil & Gas Co.,* 494 S.W.2d 624, 628 (Tex.Civ.App.—Houston [14th Dist.] 1973, no writ). "Due care" is that degree of care which a person of ordinary prudence would exercise under the same or similar circumstances.

The jury found in response to special interrogatories that Moody negligently managed Empire's business affairs and

breached his fiduciary duties to the company. The jury also found that Moody's behavior amounted to "intentional misconduct or gross negligence." The jury thus accepted Receiver's contention that Moody was at least grossly negligent in undertaking a massive acquisition program based on an artificial surplus created by the $14,403,200 revaluation of the life interest.

Moody here asserts that both the revaluation of the life interest and the subsequent acquisition program involved legitimate exercises of business judgment. Moody first contends that his revaluation of the life interest was reasonable since it was based on appraisals made by accountants and/or an actuary. The evidence is to the contrary. Hogan of Ernst & Ernst and Jard of Peat Marwick both testified that they did not revalue the life interest; indeed, Hogan stated he did not learn of the revaluation until the time of trial. He testified that the trial was the first occasion that Ernst & Ernst even had knowledge that its name had been used in Empire's 1965 annual report with the false statement that the $14 million valuation of the life interest had been calculated by his firm. Lloyd Friedman, the actuary who Moody now claims was chiefly responsible for the revaluation, testified that he did nothing more than determine Moody's life expectancy and make mathematical calculations based upon economic assumptions provided by Moody. Moody rebutted none of this testimony, and all of it is fully corroborated in the record. The conclusion is inescapable that the $14,403,200 value was placed on the life interest by Moody himself.

[15] Moody next contends that, whether or not outside experts were responsible for the revaluation, $14,403,200 was a reasonable value to place on the life interest. In particular, he argues that it was reasonable to raise the life interest's assumed growth rate from 5% to 7½% (thereby

boosting the life interest's value by millions of dollars) because ANICO's dividends, which constituted virtually all of the life interest's income, had enjoyed a 19% average annual growth rate between 1944 and 1964. This argument is easily met by noting that Ernst & Ernst was familiar with ANICO's earnings record when it found an assumed growth rate of 5% to be most reasonable. Moreover, ANICO's subsequent earnings history vindicated Ernst & Ernst's conservatism: between 1964 and 1974, the years here at issue, ANICO's dividends increased at an annual rate of only 4.62%. Finally, the $14,403,200 valuation was clearly unreasonable in relation to the life interest's income; between 1966 and 1970 the highest annual yield on the life interest at the $14 million valuation was 1.52%. Thus, between 1966 and 1970 the average amount of income that the life interest actually brought Empire each year was only about $200,000, an amount grossly disproportionate to its valuation. One expert testified that life insurance companies during those years generally guaranteed their policyholders a return of between 2½% and 3% on ordinary life insurance policies, and that the minimum yield on an asset required to guarantee such a return prudently was 3½%.[11]

Even if Moody's $14,403,200 valuation of the life interest had been reasonable, his subsequent course of conduct was not. Moody had reason to know that the life interest's value was extraordinarily volatile having seen it leap from $5,813,440 to $14,403,200 within a space of six months.

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11. Moody also contends that, even if the $14,403,200 revaluation of the life interest were unreasonable, he is not responsible for Empire's subsequent losses because the Alabama Insurance Commisioner approved the revaluation. This contention is spurious. An insurance company may not delegate responsibility for valuation of its assets to a state agency, and the mere fact that an insurance commissioner accepts a company's asset valuation does not immunize the company from liability arising from that valuation.

Moody also knew, or should have known, that if he expended Empire's liquid assets in an acquisition program any significant decline in the life interest's value would instantly render Empire insolvent. Moody nevertheless embarked upon a massive acquisition program that drained Empire of its liquid assets and made the company's economic survival depend entirely on the stability of the life interest's value. The jury could reasonably find that Moody was grossly negligent in failing to provide for the contingency that in 1972 became a reality—a sudden and substantial decline in the life interest's value.

[16] The jury's finding that Moody was grossly negligent in his management of Empire is supported by the testimony of numerous witnesses at trial. Hilton Painter, who served Empire for ten months as vice-president and director, testified that Moody was "totally incapable of operating a life insurance company," and ran Empire in an illogical, irresponsible and dangerous manner.[12] Frank Schmidt,

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12. The testimony of several witnesses at trial supports the conclusion that Moody often exhibited a blatant, callous disregard for the interests of Empire's shareholders and policyholders, especially when their interests conflicted with his own ambitious plans for the company. For instance, the following excerpt from Mr. Painter's testimony highlights one such incident that occurred during a meeting of Empire's executive committee of directors and officers:

[Mr. Hilton]:

A question arose concerning the expenditure of certain funds to acquire a minority position in another life insurance company and, as often happens in a meeting like that, there is some discussion about where the money comes from.

Q. (By Mr. Wright) Was Mr. Moody there?

A. Mr. Moody was chairing the meeting, yes sir.

Q. All right, what happened?

A. And I made the comment to Mr. Moody that – that such an expenditure would not be an acceptable expenditure be-

also an Empire vice-president and director, testified that Moody's aggressive acquisition program ran the company into bankruptcy. Laurence Cottingham, an attorney in Empire's legal department, stated that Moody "violated all rules of good management." Thomas Pennington, a vice-president of Protective, testified that Empire's investments were poor to atrocious with limited exception, that policy records were poorly maintained and incomplete, that documentation on policies assumed from acquisitions was virtually non-existent, that the administration of the reinsurance program indicated gross negligence, and that Empire was "probably the worst managed company" he

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cause it constituted the use and, in my opinion, the unauthorized use of policyholder reserves.

Q. What was Mr. Moody's reply?

A. (No response).

Q. Precisely?

A. Mr. Moody was standing at the end of the table –

THE COURT:

What was his reply?

THE WITNESS:

His reply was, "F(_ _)k the policyholders."

Q. (By Mr. Wright) All right, Mr. Painter, I take it you've heard that word used before in your adult life?

A. Yes.

Q. I want to ask you this: Have you ever heard the use of that particular profanity in a jocular manner?

A. Yes.

Q. Heard it simply used as an adjective to highlight something?

THE COURT:

Just ask him.

Q. How do you interpret that that phrase was meant at that time?

A. He said it without a trace of smile and it was very clear that he meant it in the crudest and most malicious way.

had ever seen. The jury's finding of gross negligence on the part of Moody is amply supported by the evidence.

[17, 18] Moody also argues that the district court erred in its instructions to the jury regarding the law applicable to directors' duty of care. First, he challenges the court's instruction that he was to be "held to a higher standard of care and fair-dealing than would be one not in a fiduciary position." This instruction is however, patently correct. See 15 Tex. Jur.3d, "Corporations," § 235 (1981); H. Henn, *Law of Corporations* §§ 234, 235 (2d. ed. 1970). Second, Moody complains that the court failed to instruct the jury regarding the applicability of the business judgment rule. This complaint, too, is fatuous: the court explicitly instructed the jury that directors "are not held responsible for ordinary mistakes of business judgment," and that "if Moody exercised reasonable business judgment in the acquisition program and perpetrated no fraud he is not liable to the receiver in this case however mistaken his actions might appear to be in hindsight." *See Conrick* v. *Houston Civic Opera Ass'n,* 99 S.W.2d 382, 384 (Tex.Civ. App. — Amarillo 1936, no writ); Henn, *Corporations* at § 242. Finally, Moody asserts that the court erred in instructing the jury that Moody owed fiduciary duties to the policyholders of Empire, as well as its stockholders and the corporate entity itself. We are not certain that this instruction was erroneous. *See, e.g., American Trust Co.* v. *California Western States Life Insurance Co.,* 15 Cal.2d 42, 98 P.2d 497, 510 (1940); 18 J. Appleman, *Insurance Law and Practice* § 10012 (1945). Even if this instruction were erroneous, the error was harmless.

2. *Securities Law Claims*

The jury in this case found that Moody had engaged in conduct in violation of Securities Exchange Commission

Rule 10b-5, 17 C.F.R. § 240.10b-5 (1981), enacted pursuant to § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976). Specifically, the jury found that Moody (1) failed to disclose his belief that the trust interest was intended to be non-transferable by Empire, and (2) fraudulently misrepresented the value of the life interest. Moody raises a variety of arguments in this appeal contesting the jury's findings of liability under Rule 10b-5. We need not decide, however, whether the jury's findings and the district court's holding of liability under this ground were correct, because the damages awarded may be sustained on the basis of the common law claims.

At the close of trial, the court submitted 17 special interrogatories to the jury. Question 1 asked whether Moody was negligent in his management of Empire; Question 2 asked whether Moody breached his fiduciary duties to Empire; Question 3 asked whether such negligence or breach of fiduciary duties constituted intentional misconduct or gross negligence; Question 4 asked whether Moody breached his fiduciary duties in connection with the guarantee of Credit Factoring's indebtedness to Moody Bank; Question 5 asked whether such negligent mismanagement or breach of fiduciary duties proximately caused damage to Empire stockholders' capital and surplus or Empire's ability to meet its policyholders' obligations; and Questions 6-9 cumulatively asked whether Moody violated the securities laws. The jury answered all these questions affirmatively. Question 10 then stated:

> Find from a preponderance of the evidence, what sum of money, if any, if paid now in cash would fairly and reasonably compensate Empire for damages cause [sic] by the depletion, if any, of its stockholders' capital and surplus proximately caused by such negligent mismanagement, breach of fiduciary duties or securities violations as you may have found.

The jury answered: "five million dollars."

[19] Moody argues that it is impossible to determine whether the jury based its assessment of $5,000,000 compensatory damages on the allegedly improper securities law theory or on the common law theory, and that the case must therefore be remanded for a new trial. This contention fails for several reasons. First, it is clear from the jury's answers to Questions 1-5 that it found Moody liable under common law independent from and without reference to his liability under Rule 10b-5. Second, although Question 10 is phrased in the disjunctive, the *measure* of damages recoverable by Receiver under Texas common law is the same (as will be demonstrated below) as it is under Rule 10b-5. Furthermore, there was only one wrong complained of and proved: the manipulation of the life interest leading to fatal undercapitalized acquisition; and the proof of damages on the depletion of capital was the same and not linked only to one theory of liability. Thus, the $5 million figure assessed by the jury may stand irrespective of Rule 10-b liability.[13]

C. *Damages*

1. *Measure of Damages*

[20] The district court makes the following statement in its opinion:

> What is not clear is how to measure the loss to Empire. Neither Texas law nor federal securities law provides

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13. Moody cites *Dougherty* v. *Continental Oil Co.*, 579 F.2d 954, 960 n. 2 (5th Cir.1978), *vacated*, 591 F.2d 1206 (5th Cir.1979) in support of his argument. That case is inapposite, however, because the ambiguity there concerned not the theory on which damages were based but the theory on which liability was based. Here it is clear that the jury found liability under *both* theories. Their answers to Questions 1-5 clearly indicate a finding of liability under common law and their answers to Questions 6-9 clearly indicates a finding of liability under federal securities laws. In this case it is irrevelant upon which theory the jury based its finding of damages in Question 10 because, as discussed in text, the measure of damages is the same under either theory.

> a clear guideline, so this court must fashion a measure of damages which comports with the sparse precedent available and which is just. *See Spiegel* v. *Beacon Participations,* 297 Mass. 398, 8 N.E.2d 895, 909 (1937). There being no indication otherwise, the court presumes that the measure of damages for Receiver's common law and securities law claims does not differ under state and federal law. *Cf. Pappas* v. *Moss,* 303 F.Supp. 1257, 1281 (D.N.J.1969).

475 F.Supp. at 237. We believe that the district court's "presumption" on the measure of damages was correct. To understand this conclusion, it is necessary to examine briefly the types of damages available under Rule 10b-5 and common law.

First, it is well-settled that Rule 10b-5 allows recovery of both general and special (or consequential) damages. 5B A. Jacobs, *The Impact of Rule 10b-5* § 260.03[b] (rev. ed. 1980). Special damages are defined as outlays attributable to the defendant's wrongful conduct. *Id.* at § 260.03[d]. Two limits exist on the recovery of special damages: (1) they cannot be awarded if their relationship to the defendant is too remote; (2) they are unavailable if they redress the same injury for which the plaintiff is compensated by general damages or prejudgment interest. *Id.* It is significant to note, however, that special or consequential damages are recoverable even if the plaintiff can show no general damages. *Id.*

[21, 22] Likewise, Texas common law recognizes and allows both general and special damages as a recovery for acts of fraud or deceit. Although we have found no Texas cases specifically addressing the common law liability of a director/president/majority stockholder who violates his fiduciary duties through mismanagement and thereby forces the corporation into insolvency, we determine that Texas law allows special damages against Moody under the

facts here. Examining Texas cases in three factual situations reported upon by the state courts is instructive. Specifically, we look to cases involving: (1) directors who cause the financial condition of the corporation to be misstated, thereby inducing creditors to loan money to the company; (2) the common law actions of fraud and deceit, and types of damages recoverable thereunder; and, (3) negligent corporate mismanagement by directors.

As to the first category, it appears that the Texas courts have long permitted third-party creditors to recover damages personally against corporate directors who fraudulently or even negligently misrepresent the financial condition of the company. Tex Jur.3d summarizes Texas law in this fashion:

> Directors of a corporation are personally liable to anyone who sustains loss by reason of false financial statements made by them. For example, directors have been held personally liable at common law for inducing deposits in a failing bank by representations of its solvency. Of course, the officers are liable if the false statements are shown to have been fraudulently or designedly made. So, also, where an officer has been concerned in the publication of false statements, he is liable for those statements even though he was in fact ignorant of their truth and falsity; it is his duty to inform himself of the true financial position of the corporation.
>
> Directors, in particular, are in a position of special responsibility, in view of the statutory provision vesting in them the general management of the affairs of the corporation. Directors are accordingly held liable, as a matter of law, where it appears that they allowed false statements to be published and used by employees in order to obtain credit for the corporation.

15 Tex.Jur.3d, Corporations § 300 at 455-56 (1981) (footnotes and case citations omitted).

The seminal Texas case illustrating this rule is *Cameron* v. *First National Bank*, 194 S.W. 469 (Tex.Civ.App. — Galveston 1917, writ ref'd), a case in which the plaintiffs extended a line of credit to a manufacturing corporation in reliance on false and fraudulent statements of the company's financial condition as contained in the annual report. The court found that the defendant/directors "knew the method by which the accounts of the mill were kept, and that it has been the uniform custom in preparing financial statements to include in such statements as assets accounts which had proven uncollectable and which by general commercial custom and usage should not be included in a financial statement as assets." *Id.* at 476. Concluding that the directors' authorization of the issuance of such financial statements constituted failure to exercise ordinary care, the court held that "having accepted the position and exercised the duties of directors, and having sanctioned the long-continued method of borrowing money for the company on the faith of yearly financial statements, appellants must be held responsible for the truth of the statements so sanctioned by them." *Id.* *See Durham* v. *Wichita Mill & Elevator Co.*, 202 S.W. 138 (Tex.Civ.App. — Fort Worth 1918, writ ref'd) (similar facts; holding directors liable for fraud and negligence even though plaintiff/creditor did not extend credit wholly in reliance upon false financial statements of corporation); *see also Parsons* v. *Johnson*, 28 App.Div. 1, 5, 50 N.Y.S. 780, 782 (1898) ("[A]n officer of a corporation making a false statement in the annual report becomes liable to the damages which naturally flow from or are caused by the falsehood. The Legislature has not undertaken to define the precise damage which the injured party may recover, but has used a broad term which covers all damages which flow directly from the false statement.").

[23, 24] The above cases dealing with the liability of directors to corporate creditors for false financial state-

ments are grounded upon common law theories of negligence or fraud, or both.[14] Although the common law of fraud is generally more stringent in its requirements than the elements of Rule 10b-5, it is clear that the two are closely related. In Texas in an action for common law fraud or deceit, a plaintiff must allege and prove: (1) an untrue representation made by the defendant (2) known by him to be false (3) concerning a material fact (4) made with the intent to receive the plaintiff and (5) to induce him to act in a particular manner, (6) such representation being one on which the plaintiff relied and (7) which proximately caused his damages, (8) with issues on proximate cause having to be submitted to the jury where "special" damages are sought. *See Success Motivation Institute, Inc.* v. *Lawlis,* 503 S.W.2d 864, 868 (Tex.Civ.App. — Houston [1st Dist.] 1973, writ ref'd n.r.e.); *El Paso Development Co.* v. *Ravel,* 339 S.W.2d 360, 367 (Tex.Civ.App. — El Paso 1960, writ ref'd n.r.e.). Thus *all* of the requirements of a Rule 10b-5 cause of action are included within the elements of fraud under Texas law, which imposes a few additional requirements. *Cf. Huddleston* v. *Herman & MacLean,* 640 F.2d 534, 543 (5th Cir. 1981), *modified,* 650 F.2d 815, *cert. granted,* — U.S. —, 102 S.Ct. 1766, 72 L.Ed.2d 173 (1982).

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14. We emphasize that we do not here decide the liability of a director for false financial statements when such director is ignorant of the facts underlying the misrepresentation. In *Sugarland Industries* v. *Parker,* 293 S.W. 609, 612 (Tex.Civ.App. — Texarkana 1927, writ dismissed), the court noted that "if in the transaction which is in suit it is affirmatively shown that any individual director did not have actual participation or knowledge, a claim of fraudulent or false representation cannot be predicated against him. A director is liable only for his own acts or omissions. He is not merely by virtue of his position liable." In the instant case, Moody's fraudulent and/or negligent misrepresentation of the financial state of Empire is established by the evidence, and he is the only director/defendant before us. As to the liability of a director ignorant of the facts, we are not now called upon to decide that question, but note in passing that we agree generally with the court's position in *Sugarland.*

[25, 26] Moreover, in Texas a defrauded plaintiff may recover both general and special damages, with these terms having approximately the same meaning as they do when one is talking about Rule 10b-5. The difference between general and special damages under Texas law is that general damages are the necessary and usual result of the wrong complained of, while special damages need not be the necessary and usual result of the wrong, but must be the proximate result thereof. *El Paso Development*, 339 S.W.2d at 363. "Special damages, predicated upon a wrong, which are not necessarily the usual result of the wrong, but are directly traceable to the wrongful act complained of and result therefrom, may be recovered in a common law action based on fraud and deceit; but all other damages will be held to be too remote." *Id.* at 363-64. Thus, Texas law limits special damages to those which are not too remote, uncertain, conjectural, speculative or contingent. *Id.* at 364.

The third and final category of Texas cases that is relevant is that addressing the liability of directors or officers for *negligent* (i.e., nonfraudulent) mismanagement of a corporation. For example, in *Sutton* v. *Reagan & Gee*, 405 S.W.2d 828 (Tex.Civ.App. — San Antonio 1966, writ ref'd n.r.e.), the court entertained a mismanagement action filed by a creditor of a bankrupt corporation against its officers. Although the court held that such a suit was not maintainable by an individual creditor of the corporation, it acknowledged such a cause of action is enforceable by the receiver or trustee in bankruptcy of the corporation. *Id.* at 834. With regard to the measure of liability, the court stated that a director owes a duty to the corporation to exercise due care in the management of the corporation's affairs, and for breach of this duty, the director is "clearly liable to the corporation for any loss it may suffer as a result of his neglect." The words "any loss" suggest that

special or consequential damages are recoverable in an action brought for negligent corporate mismanagement against the director of a corporation; *accord, Fagan* v. *La Gloria Oil & Gas Company,* 494 S.W.2d 624, 628 (Tex.Civ. App. — Houston [14th Dist.] 1973, no writ).

[27, 28] From the preceding discussion it is clear that Texas common law:

(1) holds directors liable to third-party creditors who act in partial reliance upon false financial statements that appear in the annual report of a corporation by the authorization of the directors.

(2) on fraud includes *all* of the elements of a Rule 10b-5 cause of action, and permits general and special damages to be recovered.

(3) holds directors who negligently mismanage a corporation liable for "any loss it may suffer as a result."

Finally, it is also clear that both federal and state courts, in awarding damages for violation of Rule 10b-5, have not insisted that the amount of damages be proven with mathematical certainty. Courts have routinely placed upon the defendant the risk of imprecise calculations of damages:

> Although the plaintiff must present as much proof as he can, the defendant has no ground to complain if the plaintiff cannot prove the extent of his injury (as distinguished from the fact he was harmed) with mathematical certainty. In effect, the defendant bears the uncertainty as to the amount of damages.

Jacobs, § 260.02 (footnotes and case citations omitted). Thus, given the obvious parallels betwen the Texas common law action for fraud and Rule 10b-5's elements, and the fact that both recognize and similarly define general and special damages, we conclude that the district court was correct in presuming that the measure of damages for

Receiver's common law and securities law claims does not differ under state and federal law.

2. *Proof of Damages*

[29] Once we accept the premise that the measure of damages are the same under federal or state law, the sole remaining question is whether Receiver adequately proved the *amount* of damages, *i.e.*, whether the evidence at trial supported the jury's verdict.[15] As we examine the evidence, we keep in mind the principle, already stated, that Moody should bear any uncertainty as to proof of the amount of damages and that Receiver need not demonstrate the amount with mathematical certainty.

As recounted earlier, the jury in response to special interrogatories found that $5 million would "fairly and reasonably compensate Empire for damages caus[ed] by the depletion ... of its stockholders' capital and surplus proximately caused by [Moody's] negligent mismanagement, breach of fiduciary duties [and federal] securities violations...." The jury also awarded $1 million in punitive damages against Moody. This verdict was rendered in 1976; thereafter, Moody's lawyers filed an avalanche of post-trial motions raising over 80 alleged grounds of error that delayed the district court's entry of final judgment until 1979.

[30-33] Moody's attack on damages denounces what he characterizes as the numerous and "outrageous" errors of the district court. From his many briefs and supplemental briefs and letters filed in this appeal, we perceive his attack on the damages to be five-fold. First, he contends that Jim

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15. The damages here are, if anything, "special" or consequential damages because they are not the "necessary and usual result" of Moody's fraudulent valuation of the life interest, but rather are, as George's testimony (recounted in the text) shows, the proximate result thereof.

George used an improper method of accounting in calculating the value of Empire's assets. Second, he argues that Receiver was relieved of the burden of proving Empire's insolvency by being allowed to rely upon a prior adjudication of this matter in the Alabama courts. Third, Moody attacks the jury's award of $1 million in punitive damages.[16] We find no merit to his contentions. Before we discuss them, however, we summarize the damages evidence.

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16. Moody raises two other arguments which relate more closely to damages recoverable for a Rule 10-b violation.

First, he argues that George's testimony did nothing more than demonstrate a dilution of Empire's shareholders' equity, which Moody claims is not a compensable loss under existing precedent in this circuit. As support for this proposition, Moody cites a progression of Fifth Circuit cases, including *Herpich* v. *Wallace*, 430 F.2d 792 (5th Cir.1970); *Wolf* v. *Frank*, 477 F.2d 467 (5th Cir.), *cert. denied*, 414 U.S. 975, 94 S.Ct. 287, 38 L.Ed.2d 218 (1973); and *Sargent* v. *Genesco, Inc.*, 492 F.2d 750, 765 (5th Cir. 1974). In essence, Moody's argument is a back-handed attempt to attack Receiver's standing to maintain the Rule 10b-5 cause of action. He points particularly to *Wolf* v. *Frank*, a case in which the district court dismissed the plaintiff's individual 10b-5 claim because they "were unable to show any actual damages inasmuch as the dilution of their equity interest was not a cognizable element of damages for a violation of Rule 10b-5." 477 F.2d at 478. We affirmed the district court's action on the basis of our earlier opinion in *Herpich* v. *Wallace*, stating that the plaintiffs "[did] not have standing to seek individual damages for the dilution of equity interest caused by the [stock exchange in question] because plaintiffs were neither purchasers or sellers in connection with that transaction." *Id.*

Moody's argument misperceives our previous holdings in these cases. All three of these cases very plainly held that shareholders could assert a 10b-5 *derivative* action on behalf of a corporation although they were neither actual purchasers nor sellers. 430 F.2d at 809-10; 447 F.2d at 478-79; 492 F.2d at 762-66; *see Imperial Supply Co.* v. *Northern Ohio Bank*, 430 F.Supp. 339, 348 n. 6 (N.D.Ohio 1976). The present case is just such a derivative suit brought by Receiver, and so, even if we were to reach the issue of 10b-5 liability, it is clear that Receiver would have standing to assert such a claim. Moreover, the cases cited by Moody do not hold that dilution of stockholders' equity is never a compensable loss in 10b-5 actions, whether derivative or direct. They merely hold that dilution of shareholders' equity does not

At trial the chief damages witness for Receiver was Jim George, a manager in the Insurance Department of Alexander Grant & Co., a national accounting firm, and a former life insurance specialist with the international accounting firm of Peat, Marwick, Mitchell & Co. George testified that Alexander Grant & Co. had been retained by Receiver "to put together a complete accounting picture absent performing an audit of the entities involved in the birth, growth and demise of Empire . . . ." As a result, George and the

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confer "purchaser" or "seller" status on a plaintiff seeking to overcome the standing hurdle in a direct 10b-5 suit. Perhaps this distinction is best expressed by the court in *Sargent*: *"Thus, although dilution of equity may be an appropriate measure of damages, such dilution does not confer standing."* 492 F.2d at 765 (emphasis added).

Moody also argues that the district court should have awarded damages, if at all, under the "out-of-pocket" theory which, as he points out, is the usual measure of damages applied in Rule 10b-5 cases. Our declining to reach the issue of 10b-5 liability does not necessarily answer this argument because, as we have pointed out before, the "out-of-pocket" theory may also be applied at common law. *Huddleston* v. *Herman & McLean*, 640 F.2d at 555 & n. 34. We reject it as the proper measure of damages here, though, for the following reason. Under the out-of-pocket rule, a defrauded buyer is entitled to recover the difference between the price paid for securities and the real value when bought. *Id.* at 555-56. Under the unusual facts here, it is questionable whether this measure of damages could properly be applied to ascertain Empire's losses through its mergers and outright purchases of shares in other corporations for no allegation has ever been made that Empire did not receive "full value" when acquiring these securities, yet the evidence overwhelmingly demonstrates, as we have discussed in the text, that Empire suffered huge, tangible damages in the millions of dollars because of these acquisitions. Moreover, the acquisition program also involved the purchase of blocks of life insurance policies through bulk reinsurance agreements; such purchases did not involve securities, *see* 475 F.Supp. at 245. Thus, application of the out-of-pocket rule makes no sense in assessing damages suffered by Empire as a result of this aspect of its acquisition program. Yet these reinsurance agreements no less than the mergers and purchases of securities caused injury to Empire and were clearly compensable under the state law mismanagement action.

Insurance Department of Alexander Grant spent over one year examining the records and books of Empire for the period from 1963 to 1972. Scrutinized in the process were minutes of meetings of the board of directors, executive committee, and shareholders, proxy statements to shareholders, bulk reinsurance agreements and consents of insurance commissioners, mortgage loan files, annual financial statements, reports of state insurance examining departments, memoranda of officers and directors of Empire and its subsidiaries and controlled affiliates, and documents related to Empire's interest in the Libbie Shearn Moody Trust, including Ernst & Ernst's valuation of the trust.

George presented the results of this exhaustive analysis in his testimony at trial; the transcription of his testimony on direct examination alone covers 94 typewritten pages in the record before us. Basically, George described to the jury his method of measuring the damages suffered by Empire:

> All I did was take the years '64 through '72 as reported by the company, shoved them together and said fine, now summarize what caused the change in stockholders equity to be in the beginning three hundred ninety-four thousand and at the end, '72, be a $7,000,000 deficit, or a swing, if you please, of $7,400,000.

George concluded, based on his analysis of the change in stockholders' equity from Empire's inception to its ultimate receivership, that the cause of Empire's downfall was the aggressive acquisition program it had pursued; he also explained that the acquisition program would not have been possible without the artificial inflation of the trust value from $5,813,440 to 14,403,200:

> Q. [Counsel for Receiver]:
> Out of that study, we'll go back and analyze the segments, give us the ultimate conclusions.

Was there any particular cause of the company's collapse or were there hundreds of causes that are reflected by your studies of the financial history of Empire life?

A. [George]:

To point to one thing and say this caused, this transaction caused the demise, you couldn't do. You have to look at the entire program.

It was the total impact of the merger acquisition program creating huge drains on surplus of the insurance company that triggered or caused its insolvency.

Q. Did you come to any conclusion as to how Empire Life was able to embark and effectuate this acquisition program that you spoke of?

A. Yes, this is what I was trying to get across [a] while ago.

The contribution of the Trust Interest created equity, if you please, of $14,000,000. Had that equity not been there, it's my opinion that a merger acquisition program of the magnitude executed by the company could not have been done, could not have been attempted. The $14,000,000 increase in equity provided a right or a license, if you please, to use assets of the company to go on a merger acquisition program.

George also explained that the acquisition program had resulted in Empire's obtaining assets that, when valued under statutory accounting principles as required by state insurance law, were nonincome producing and had to be valued below their cost. In short, his testimony explained how Moody's acquisition scheme caused Empire to exchange liquid assets deemed "admitted" under state law, *e.g.*, cash and marketable securities, for noliquid assets statuorily valued at significantly less than cost. This left Empire with inadequate liquid assets, *i.e.*, cash reserves, with which to

pay its routine obligations such as policyholders' claims.[17] George testified that the difference between cost and statutory value of the property acquired by Empire was $9,207,242, *i.e.*, Empire's liquid and admitted assets were reduced by this amount as a result of the acquisitions. The low statutory value of the acquired property and its non-liquidity, when coupled with the sudden reduction in value of the trust interest by the Alabama Insurance Commissioner, rendered Empire statutorily insolvent. George reiterated that such insolvency was caused by the acquisition program:

> Q. [Counsel]:
>
> Was there any other cause reflected by the — your study of the financial statements that could have made — placed Empire Life Insurance Company into receivership, in an insolvent posture?
>
> A. [George]:
>
> I keep coming back to the same answer, the acquisition program.

George then stated that, in his view, Empire had suffered damages of somewhere between $7 and $10 million dollars. The $7 million or bottom figure was his calculation of the deficit and drain on shareholder equity caused by the acquisition and merger program; the top or $10 million figure represented the $14 million excess of Empire's liabili-

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17. In fact, the exchange of Empire's liquid, admitted assets for non-liquid, nonadmitted ones at times left Empire with little more than the income produced by the life interest to back up its routine obligations. Yet as noted earlier, although the life interest was valued at over $14 million, it only brought in about $200,000 yearly in actual income, an amount clearly inadequate to cover payments to policyholders and other business operating expenses. At trial an insurance examiner/expert for the State of Oklahoma, Ben Larson (who had studied Empire's financial condition in detail), testified that Empire's liquid capitalization was seriously inadequate to cover routine obligations even *before* the value of the life interest was inflated from $5 to $14 million.

ties over assets at the time it entered its bulk reinsurance agreement with Protective Life Insurance Co., less the $4 million value of the Moody trust interest at the time Empire entered receivership. George's extensive analysis and conclusions were borne out by the testimony of three other experts at trial (including former directors and officers of Empire) as was set forth in the opinion of the district court. 475 F.Supp. at 240.

a. *Asset Valuation*

Moody's most vehement attack on the damages evidence is directed toward George's method of calculating the value of Empire's assets. Moody raised this same contention in district court, whose characterization of it adequately summarizes his argument now:

> Moody attacks George's testimony on the ground that, if he had employed generally accepted accounting principles rather than statutory accounting principles, he would have valued the "downstream" assets that Empire acquired through its acquisition program much higher, and may have determined that Empire was in fact solvent at the time it entered receivership. Moody alleges that George relied solely upon statutory accounting principles in forming his opinion as to the damage caused by the acquisition program to Empire and therefore his testimony does not sufficiently prove that Empire suffered actual damages.

475 F.Supp. at 240.

Statutory accounting principles ("SAP") are rules that state insurance departments have developed to regulate life insurance companies; SAP mandate that conservative methods be employed in valuing the assets of such companies to guarantee their continuing solvency. D. Gregg & V. Lucas, *Life and Health Insurance Handbook* 1048 (3d ed. 1973); D. McGill, *Life Insurance* 860-61 (rev. ed. 1967).

This routine conservatism as reflected through use of SAP requires only that certain types of assets be considered in calculating a company's financial condition, and that the value of such "admitted" assets be determined according to quite restrictive rules. McGill, *Life Insurance* at 863-64. In short, it is clear that the standard practice in the life insurance industry is to determine the solvency of insurance companies by reference to SAP, even though, under generally accepted accounting principles ("GAAP"),[18] assets may be shown to have substantially greater value and might show a net equity of the company. 19 A.J. Appleman, *Insurance Law and Practice* § 10641 at 42 (1982); McGill, *Life Insurance* at 860-64; R. Strain, *Life Insurance Accounting* 353-54 (Merritt Co. ed. 1977); *In re American Investors Assurance Co.*, 521 P.2d 560, 562 (Utah 1974). George explained all of this at trial when he testified that life insurance companies are "'run and managed'" and "'bought and sold'" according to SAP. 475 F.2d at 242.[19]

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18. On the differences between SAP and GAAP, *see* D. Gregg & V. Lucas, *Life and Health Insurance Handbook* 1048-49 (3d ed. 1973); S. Huebner & K. Black, *Life Insurance* 528-80 (9th ed. 1976); D. McGill, *Life Insurance* 860-65 (rev. ed. 1967); R. Mehr, *Life Insurance* 658-60, 673-75 (rev. ed. 1977); R. Strain, *Life Insurance Accounting* 353-84 (Merritt Co. ed. 1977).

19. We are not at all certain from our reading of the record that George himself did not employ GAAP when calculating the dollar amount of Empire's insolvency. At trial George presented a summary of his calculations in a graph or chart entitled "Analysis of Changes in Stockholders' Equity" for Empire covering the years 1964-72. This chart, admitted into evidence during his testimony as an exhibit (PX # 19), specifically utilizes a dollar amount representing the value of Empire's nonadmitted assets in the calculation of its equity deficit. We also note that Moody's counsel never cross-examined George or the other experts as to whether they considered the value of Empire's nonadmitted assets or relied exclusively on SAP in calculating the amount of damages suffered by Empire.

In addition, we believe that valuation of Empire's assets under GAAP would not help Moody's position. The record reveals a

[34] The simple answer to Moody's argument about asset values is that Empire was insolvent under the law[20] and that the damages were determined after the assets had been transferred. If Moody had any support for the contention that the capital accounts would show a different balance if the assets were valued differently, he should have come forward with it.

b. *Prior Adjudication of Empire's Insolvency*

[35, 36] Moody also attacks the damages award by arguing that Receiver was relieved of the burden of proving

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letter from Peat, Marwick, Mitchell & Co. to Moody dated April 2, 1965, in which Peat Marwick transmitted the unaudited financial statement it prepared for Empire for the year ending December 31, 1964. This letter is significant because it represents the first time the value of the life interest was stated at the inflated value of $14,403,200. After noting the increased valuation placed on the life interest, Peat Marwick offered this caveat to Moody:

> You have informed us that this interest was acquired at no cost to the company. *In accordance with generally accepted accounting principles, the life interests in the Libbie Shearn Moody Trust should be valued at cost* rather than the computed value as determined by the actuary [$14,403,200] or the admitted value as shown by the annual statements [$5,813,440].

(emphasis added). Thus, if Moody followed GAAP in determining the value of the life interest, he should have listed its value in Empire's annual report as either $0.00, its "no cost" value, or $200,000, the amount of the surplus debenture that Empire transferred to Moody in consideration for his original assignment of 40% of his interest in the trust to Empire. Yet Moody ignored GAAP and the advice of Peat Marwick and caused the value of the life interest to be reported to shareholders as $14,403,200!

20. Alabama law expressly employs the use of SAP in calculating the solvency of life insurance companies. The Alabama Insurance Code very plainly spells out what kinds of insurance company assets are to be admitted or rejected. Ala.Code §§ 27-37-1, 27-37-2 (1975). These or similar statutory provisions have been in effect in Alabama since Empire began its acquisition program in the 1960's and were in force in 1972 at the time of its insolvency.

Empire's insolvency by being permitted to stand on a prior judicial adjudication of the issue. This contention is spurious. As recounted earlier, in 1974 Receiver sought an order to liquidate Empire and approve its bulk reinsurance by Protective Life. An Alabama receivership court granted such an order in a judicial proceeding in which Empire was adjudged to be statutorily insolvent in excess of $6 million and impaired in excess of $10 million. At the close of the trial in the instant case, the district court instructed the jury that Empire had been declared insolvent in the earlier Alabama proceeding and that such finding of insolvency was "binding on the parties at this time."[21] Moody contends that this instruction relieved Receiver of the burden of proving insolvency and the amount of damages suffered by Empire. We disagree.

First, the jury had already been informed of this adjudication of insolvency during testimony at trial (to which, we might point out, no objection was made). Second, at no time was the jury ever informed of the dollar amounts by which the Alabama court found Empire to be insolvent and impaired; indeed, the district court repeatedly stressed that the amount by which Empire was found to be insolvent in the Alabama proceeding could not be used as proof of damages in the instant case. Thus, it is impossible that the jury could have relied on the adjudication of the Alabama court in calculating the $5 million damage award it returned. Moreover, Receiver obviously did not purport to rely upon the Alabama adjudication as proof of the amount of damages that Empire suffered, but instead tendered the exhaustive testimony of George and other experts which we have already discussed.

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21. We note that Moody, in his reply brief, admits that he intervened as a codefendant with Empire in the Alabama proceeding brought by Receiver; as a result, he is bound by the adjudication there of the fact of Empire's insolvency.

c. *Moody's Day of Judgment*

[37-39] Punitive damages are not recoverable in a Rule 10b-5 action, but may be recovered under pendent state claims.[22] *Petrites* v. *J.C. Bradford & Co.*, 646 F.2d 1033, 1036 (5th Cir.1981). Moody argues that the district court erred in failing to instruct the jury that it could not consider any securities law violations in assessing punitive damages. Moody did not object at trial to the court's failure to give this cautionary instruction, however, and such failure may not now be assailed on appeal. Fed.R.Civ.P. 51. It is true that even absent objection we may consider errors in jury instructions that seriously affect the fairness and integrity of the proceedings. *Delancey* v. *Motichek Towing Service, Inc.*, 427 F.2d 897, 901 (5th Cir.1970); *Dunn* v. *Sears, Roebuck & Co.*, 639 F.2d 1171, 1176 (5th Cir.1981). However, Moody's wrongful conduct was the same whatever the basis of legal liability, and the court's failure to include a cautionary instruction relative to the legal basis for punitive damages could not result in a miscarriage of justice.

D. *Motion for Mistrial*

Moody raises one final argument for our consideration. He claims that the district court erred in failing to grant his motion for a mistrial based upon the allegedly prejudicial comments made by counsel for Receiver during closing jury argument. First, Moody claims that he was compared to Adolph Hitler. This claim is not entirely accurate. At one point during the examination of Richard E. Linn (an accountant with Empire and witness at trial) the parties were discussing a memorandum from Moody in which he issued directions to Empire's "field units." In

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22. Texas law permits punitive damages to be recovered under the facts of this case. *See Collins* v. *Miller*, 443 S.W.2d 298 (Tex.Civ.App. – Austin 1969, writ ref'd n.r.e.); *Williams B. Roberts, Inc.* v. *McDrilling Co.*, 579 S.W.2d 335, 340 (Tex.Civ. App. – Corpus Christi 1979, no writ).

trying to ascertain what Moody meant by the term "field units," counsel for Receiver commented that the term originated with Adolph Hitler in World War II. Counsel for Moody objected and the district judge sustained the objection.

Moody also claims that he was unfairly likened to criminals widely known by the public. This also occurred during closing jury argument of counsel for Receiver:

> The Court will instruct you that the insolvency of Empire Life Insurance Company of America has been determined by a court which Mr. Moody was a part of and he's further going to instruct you that the motives of the people that put it into insolvency are not relevant, are not material to any issue in this case. But, having heard the argument, let me remind you that everybody from Ben Jack Cage to Billy Sol Estes to Shearn Moody that's been in a suit like this has claimed politics and, indeed, Richard Nixon and Mr. Agnew have the same claim and they all, whenever there's no other defense, attack the attacker.
>
> In many ways, this case has been tried a little bit like a rape case. You don't defend yourself against the crime, you attack the integrity of the people who were had, who were injured. You attack the witnesses.

Moody did not object to these allegedly prejudicial comments at the time they were made, although he did object to them and moved for a mistrial upon a completion of Receiver's closing argument. The district court denied the motion for mistrial.

[40, 41] It is well-established that a motion for new trial based upon inflammatory remarks is addressed to the sound discretion of the trial judge, and his ruling thereon will not be disturbed absent an abuse of that discretion. *International City Bank & Trust Co.* v. *Morgan Walton Properties, Inc.*, 675 F.2d 666, 669 (5th Cir. 1982); *Crown Colony*

Distributors, Inc. v. *United States Fire Insurance Co.*, 510 F.2d 544, 545 (5th Cir. 1975). In the instant case, although the comments by Receiver's counsel may have been unnecessary and even unfortunate, we cannot say that the district judge abused his discretion in denying a motion for a mistrial. These comments occurred in two isolated and brief instances during the course of an extremely long and otherwise fairly litigated trial. From our review of the record, we cannot say that the " 'conduct of [Receiver's] counsel was such to impair gravely the calm and dispassionate consideration of the case by the jury . . . .' " *Crown Colony*, 510 F.2d at 545. We are convinced that the verdict in this case is rationally based on the convincing evidence at trial and is not the product of an impassioned jury swayed by a few passing references made by Receiver's counsel.

AFFIRMED.

APPENDIX B

In The

United States District Court

For The Northern District of Texas

Dallas Division

David C. Meyers, *Et al.*, *Plaintiffs* v. Shearn Moody, Jr., *Et al.*, *Defendants*	Civil Action No. CA-3-5678-D
AND	
Bernard Haines, *Et al.*, *Plaintiffs* v. Shearn Moody, Jr., *Et al.*, *Defendants*	Civil Action No. CA-3-7625-D
AND	
Charles H. Payne, *Receiver* v. Shearn Moody, Jr.	Consolidated

MEMORANDUM OPINION AND ORDER

The Defendant's Motion for Judgment on the Verdict; in the Alternative, for Judgment N.O.V.; and in the Further Alternative, for a Partial New Trial and for Dismissal for Failure to State a Claim Upon Which Relief Can Be Granted came on for consideration before the court, the Honorable Robert M. Hill, United States District Judge. The court has considered the motion and is of the opinion that the motion should be denied.

I. DAMAGES

Defendant Shearn Moody, Jr.'s (Moody) primary attack upon the jury's verdict in this case, camouflaged among some 82 alleged grounds of error, centers on its findings of damages. The jury found that five million dollars would compensate Empire Life Insurance Company of America (Empire) for damages caused by the depletion of its stockholders' capital and surplus proximately caused by Moody's negligent mismanagement, breach of fiduciary duty and violations of federal securities law. Court's Charge to the Jury (Charge), Question No. 10. It further found that Moody should pay one million dollars in punitive damages as a result of his intentional misconduct and gross negligence in managing Empire. Charge, Question No. 12. The court instructed the jury that, in determining Empire's damages, it should only consider "the amount of impairment at the time of Receivership, if any, to the corporation consisting of the loss of capital and paid in surplus." Charge at 21. Moody essentially contends that the court did not instruct the jury as to the correct measure of damages, and that the plaintiff, Empire's receiver (Receiver), did not present sufficient evidence to support an award of damages.

Waiver

At the outset, the court must determine whether Moody has waived his objections to the jury's verdict on damages for purposes of his motions for judgment n.o.v. and for a partial new trial. F.R.Civ.P. 50(a) requires that a motion for a directed verdict state the specific grounds therefor. Further, a party may not assert a ground in a motion for judgment notwithstanding the verdict that was not included in the motion for a directed verdict. 9 Wright & Miller, Federal Practice and Procedure, § 2537 at 598; *Sulmeyer* v. *Coca Cola Co.*, 515 F.2d 835, 846 (5th Cir. 1975). Moody

did assert in his motion for a directed verdict that Empire's insolvency is not the proper measure of its damages. (T. 1416). He did not, however, specifically contend that measurement of Empire's damages as of the time of the Alabama receivership adjudication was incorrect. Furthermore, he did not specifically contend as the ground for Receiver's failure to introduce sufficient evidence of damages the reliance of its experts witness upon an incorrect accounting method. (T. 1414-16). Therefore, he may not allege these grounds in a motion for judgment notwithstanding the verdict.

Federal Rules of Civil Procedure 46 and 51 govern whether Moody may present in a motion for new trial his objections to the jury's verdict on damages. These rules require that a party specifically and timely object to the introduction of evidence or to an instruction to the jury, and give specific grounds therefor, in order to preserve such objection for a motion for new trial. *See Patton* v. *Archer,* No. 77-1381 (5th Cir. Mar. 7, 1979); *Jamison Co.* v. *Westvaco Corp.,* 526 F.2d 922, (5th Cir. 1976); 9 Wright & Miller, Federal Practice and Procedure, § 2472. Since Moody did not object at trial to Receiver's expert testimony on damages on the specific ground that it was based upon improper accounting principles, he has waived any objection to the admission of such testimony. Moody did object to the submission to the jury of question 10 concerning damages on the ground that insufficient evidence supported its submission. (T. 2399). He also objected to the measure of damages set forth in question 10 on the ground that damages should be measured as of the time of each wrongful act alleged. (T. 2403). Accordingly, Moody may assert as grounds for new trial that plaintiff did not present evidence of sufficient weight to support the jury's finding of damages and that question 10 stated an improper measure of damages.

Measure of Damages

Receiver is entitled to recover on behalf of Empire compensation for losses proximately caused to the company by Moody's negligence and breach of fiduciary duty. *See Home Telephone Co.* v. *Darley,* 355 F.Supp. 992 (N.D. Miss. 1973), *aff'd per curiam,* 489 F.2d 1403 (5th Cir. 1974); *Hux* v. *Butler,* 339 F.2d 696, 701 (6th Cir. 1964); 19 C.J.S. Corporations § 833(d). Receiver may also recover on behalf of Empire damages proximately caused to it by Moody's violations of Rule 10b-5. *Moody* v. *Bache & Co., Inc.,* 570 F.2d 523, 527 (5th Cir. 1978); *Herpich* v. *Wallace,* 430 F.2d 792, 810 (5th Cir. 1970). This much is clear. What is not clear is how to measure the loss to Empire. Neither Texas law nor federal securities law provides a clear guideline, so this court must fashion a measure of damages which comports with the sparce precedent available and which is just. *See Spiegel* v. *Beacon Participations,* 297 Mass. 398, 8 N.E.2d 895, 909 (1937). There being no indication otherwise, the court presumes that the measure of damages for Receiver's common law and securities law claims does not differ under state and federal law. *Cf. Pappas* v. *Moss.* 303 F.Supp. 1257, 1281 (D. N.J. 1969).

In *Commonwealth of Massachusetts* v. *Davis,* 168 S.W.2d 216, 233 (Tex. 1942), the Texas Supreme Court indicated that corporate loss may be measured in terms of loss of value or physical damage to corporate assets, restraints upon the marketability of corporate assets, and interference with the development of corporate properties. The Supreme Judicial Court of Massachusetts in *Spiegel* v. *Beacon Participations* 297 Mass. 398, 8 N.E.2d 895, 909-911 (1937) assessed the damage caused to a corporation by an improper series of transactions according to loss in value of corporate assets. In *Spiegel,* certain directors of defendant Beacon Participations, an investment company,

authorized the investment of corporate funds in a joint venture with an investment company owned by two directors of Beacon Participations. The trial court found the responsible directors of Beacon Participations "grossly negligent" and in breach of their fiduciary duty to the company in authorizing this transaction because they did not require a capital investment or other security from the company's joint venturer and thus put Beacon Participations' capital at risk for the benefit of the joint venturer and not for the benefit of the company. The venture suffered losses in excess of $60,000. Since the responsible directors' wrongdoing consisted in the very entering of the joint venture and not in the particular transactions conducted by the venture, the court approved a rule of damages assessing the responsible directors for one-half the losses sustained by the joint venture as a result of transactions entered into while they remained directors. The court ruled that damages should be measured "according to general principles of gain and loss" as of the date of the final hearing to determine damages. *Spiegel, supra,* 8 N.E.2d at 911. Thus, the value of the stock remaining in the hands of the joint venture, sums realized from the sale of such stock, and contributions by the joint venturer were to be taken into account in calculating losses.

In *Insuranshares Corp.* v. *Northern Fiscal Corp.,* 42 F.Supp. 126 (E. D. Pa. 1941), a federal district court also analyzed damages caused to a corporation by a wrongful series of transactions according to loss in value of corporate assets. In that case the controlling shareholders of an investment corporation were found liable for turning over control of the corporation to persons who looted the assets of the company through a series of fraudulent transactions and who, in turn, transferred control of the corporation to another person, who looted the corporation further. The *Insuranshares* court interpreted the "ortho-

dox rule" of damages formulated in *Spiegel* to be the "difference in dollars between the assets of the plaintiff before the acts complained of and those found remaining at the time of suit" and applied a variant of that rule. The court varied from the *Spiegel* measure of damages in assessing damages as of the time of suit according to the loss in value of corporate assets caused by the defendant's wrongdoing less the increase in value of corporate assets also attributable to defendant's wrongdoing.

The measure of damages instructed to the jury in this case logically follows the formulations in *Spiegel* and *Insuranshares*. "The amount of impairment at the time of Receivership, if any, to the corporation consisting of the loss of capital and paid in surplus" proximately caused by the acquisition program negligently and fraudulently engineered by Moody takes into consideration the losses and gains in value of Empire's assets caused by Moody's wrongdoing and the increases and decreases in corporate liabilities caused by his wrongdoing. It measures loss according to general principles of gain and loss.

The measure of damages instructed to the jury differs from that employed in *Spiegel* and *Insuranshares* in that gains and losses are valued as of the time of the receivership adjudication. *Spiegel* applied a true rescissory measure of damages in determining loss as of the time of the hearing to determine loss. *See* Note, *The Assessment of Damages in Rule 10b-5 Cases,* 26 Stan. L.Rev. 371 (1974). As did this court, the *Insuranshares* court applied a rescissory measure of damages, but chose a post transaction date earlier than the date of the hearing to determine damages on which to measure damages. It measured damages as of the date of suit.

Moody contends that damages should be measured as of the time of each transaction constituting the acquisition

program. He thus argues for an out-of-pocket measure of damages. *See* Note, 26 Stan. L.Rev. 371 (1974). The Fifth Circuit recently applied an out-of-pocket measure of damages in a shareholder's derivative suit brought under Florida law to challenge a corporation's purchase of its own shares at an inflated price. *Schilling* v. *Belcher,* 582 F.2d 995, 1005 (5th Cir. 1978). *But see Dupuy* v. *Dupuy,* 551 F.2d 1005, 1024-25 (5th Cir. 1977); *Bird* v. *Ferry,* 497 F.2d 112 (5th Cir. 1974); *Colvin* v. *Dempsey-Tegeler & Co.* 477 F.2d 1283, 1288 n. 7 (5th Cir. 1973) (out-of-pocket measure of damages not applied). Although an out-of-pocket measure of damages may be proper in a suit challenging a market transaction entered into by a defendant with numerous sellers or buyers, plaintiffs in Receiver's position would be deterred from bringing suit if required to go to the expense of segregating a series of transactions over a number of years for purposes of calculating losses. *Cf. Daniels Towing Services, Inc.* v. *Nat Harrison Associates, Inc.,* 432 F.2d 103, 106 (5th Cir. 1970); *Hunter* v. *Shell Oil Co.,* 198 F.2d 485, 490 (5th Cir. 1952). Furthermore, an expert witness, James Lewis George (George), testified that Empire's loss was caused by the cumulative impact of the transactions constituting the acquisition program, (T. 597). A measure of Empire's loss which aggregated the separate impace of each transaction would therefore not be consistent with the cause of Empire's loss.

A commentator has suggested that courts sometimes measure damages as of a post transaction date other than the date of the hearing to determine damages because such a date is the earliest on which a precise valuation of loss can be made. Note, 26 Stanford L. Rev. 371, 375 (1974) Citing *Niles* v. *New York Central,* 68 N.E. 142 (N.Y. 1903), Moody contends in his memorandum of law (p. 24) — in the alternative, it appears, to his argument for an out-of-

pocket measure of damages — that the best date for valuing Empire's loss, if any, is some future date when Empire's assets are liquidated. Clearly, Receiver need not await Empire's liquidation to receive compensation for the loss incurred by Empire as a result of Moody's wrongdoing. *See Spiegel, supra,* 8 N.E.2d at 911. The date instructed to the jury on which to measure Empire's loss — the date of Receivership — is a proper date on which to assess damages in this case for two reasons. One, George testified that Empire's damages became measurable "at such time as the Insurance Commissioner stepped in and said the valuation of the Trust Interest is not an amount any where near the amount you are carrying it," (T. 598) and receivership adjudication shortly followed the devaluation of Moody's trust interest. Two, valuation of Empire as of the date of Receivership permitted the jury to take into account the impact of an adjudication of insolvency on Empire's value. *See* discussion at p. 11, *infra.*

In addition to being proper, the date instructed to the jury on which to measure Empire's damages is fair to Moody. One criticism of the rescissory measure of damages is that it permits market forces for which the defendant is not responsible to affect the amount of damages awarded. *See* Note *supra.* The Second Circuit justified a rescissory measure of damages — the difference between the purchase price of certain securities and the sale price of the securities — on the ground that the buyer would not have purchased the securities at any price but for the misrepresentations of the defendant, his stockbroker. *Chasins* v. *Smith, Barney & Co.,* 438 F.2d 1167, 1173 (2d Cir. 1970); *see Dupuy, supra,* 551 F.2d at 1025; *cf. Colvin, supra,* 477 F.2d at 1288 n.7. Since the evidence in this case shows that Empire *could not* have embarked upon the acquisition program *but for* the inflated trust interest (e.g., T. 542-43),

the court is justified on the ground adduced in *Chasins* in applying a rescissory measure of damages.

Under the circumstances of this case, furthermore, measurement of the loss caused to Empire by the acquisition program at a date later than the acquisitions themselves probably benefits Moody. Measurement of Empire's value following the acquisition program gives the "downstream investments" acquired by Empire during its acquisition program, *see* discussion at p. 8, *infra*, a chance to produce income and thereby mitigate Empire's loss. On the other hand, since it would become difficult to assess the damages attributable to Moody's actions after Empire had fallen into the hands of the Receiver, *cf. Insuranshares, supra*, 42 F. Supp. at 131, measurement of damages as of the date of Receivership avoids the possibility that Moody will pay for any losses caused by the Receiver. The court notes, finally, that Moody has not offered any evidence which would show that measurement of Empire's damages as of a given date would result in significantly lower damages than that achieved by measuring Empire's damages as of the date of Receivership. For the reasons set forth above, the court is of the opinion that it instructed a fair and proper measure of damages to the jury.

Proof of Injury and Damages

Receiver chiefly relies upon George's expert testimony to support the jury's award of damages. George testified that the increase in valuation of the Moody trust interest from approximately $5,800,000 to approximately $14,000,000 enabled Empire to embark upon an aggressive program of mergers with insurance companies, purchases of controlling interests in insurance companies, and purchases of blocks of insurance in force all of which "created huge drains on surplus" (T. 542) and ultimately caused damages to Empire measurable in 1972 in a range between $7,000,000 and

$10,000,000. (T 601-603). George explained that the acquisition program created drains on surplus because the assets acquired generated income "downstream." Hence, they were valued according to statutory accounting principles at an amount significantly below their costs. George labelled this difference between cost and statutory value as "unrealized investment losses" and calculated these to be $9,207,242 in his chart analyzing changes in stockholder's equity in Empire between 1964 and 1972 (Px. 19). The capital structure of Empire could withstand this drain or surplus only so long as the trust interest remained valued at $14,000,000. When it was devalued by the Alabama Commissioner of Insurance, Empire instantly became insolvent. Another expert, Hilton Painter, described the effect of the acquisition policy as "looting" the "good hard assets" of Empire (T. 137) because the acquisitions ultimately were supported by Empire's liquid assets rather than by the trust interest. Two other experts, Frank I. Schmidt and Ben Larson, concurred that the acquisition program caused Empire to become insolvent. (T. 319, 1279). Larson also opined that Empire made "bad acquisitions." (T. 1278-79). George's calculation that Empire incurred realized investment losses of $2,964,591 between 1964 and 1972 (Px. 19) supports this assessment.

George arrived at his range of damages by taking the stockholders' deficit of $7,000,000 generated by his analysis of changes in stockholders' equity from 1964-1972 as the low point of the range and by taking the $14,000,000 deficit "reflected in Best Reports concerning the ultimate bulk reinsurance" by Protective Life Insurance Company of Alabama (Protective) of Empire (T. 602), less a $4,000,000 value for the trust interest, as the high point. Protective, the highest bidder for Empire's assets and liabilities[1] after

1. The assets for which Protective bid did not include a fund of $2,000,000 retained by Receiver to pay creditors other than policy holders (T. 1177).

Empire entered receivership, required that a $13,000,000 moratorium be imposed for ten years on the cash values of insurance policies issued by Empire (T. 1180-82, 1244), evidence that, in real business terms as well as according to statutory accounting principles, Empire's liabilities significantly exceeded its assets in 1972.

Moody attacks George's testimony on the ground that, if he had employed generally accepted accounting principles rather than statutory accounting principles, he would have valued the "downstream" assets that Empire acquired through its acquisition program much higher, and may have determined that Empire was in fact solvent at the time it entered receivership. Moody alleges that George relied solely upon statutory accounting principles in forming his opinion as to the damage caused by the acquisition program to Empire and therefore his testimony does not sufficiently prove that Empire suffered actual damages.

George testified that statutory accounting principles are the rules that each state has evolved in regulating insurance companies, whereas generally accepted accounting principles have been established for stock life insurance companies by the accounting profession (T. 531). He also testified that there are material differences between the two methods of accounting (T. 531). Some evidence in the record, in addition to cases cited by Moody, specify certain of these material differences, DX 42 n.l.; *see, e.g., Norte & Co. Huffines,* 504 F.Supp. 1096, 1103 (S.D. N.Y. 1968), *aff'd in part, rev'd in part and remanded,* 416 F.2d 1189 (2d Cir. 1969); *Franklin Life Insurance Co.* v. *U.S.,* 399 F.2d 757 (7th Cir. 1968), but Moody nowhere has presented evidence cognizable by this court of a comprehensive valuation of Empire's assets and liabilities at the time Empire entered receivership according to generally accepted accounting principles. Rather, it has pointed to

the values of Empire's "non-admitted assets" as of December 31, 1970, included in Empire's Annual Statement and the NAIC Zone Examination Report of Empire (PX 80, Ex.B, p. 54; DX 37, p.14). Moody also relies upon testimony that a block of whole life insurance has a rule of thumb value for business purposes of one-and-one-half times the annual premium income of the block of insurance and no value according to statutory accounting principles (T. 989-990, 1339-1340). He then calculates the rule of thumb value of Empire's insurance in force in 1970 (DX 37, p.4) to underscore the inadequacy of George's determination of damages.

Moody's assorted examples of assets undervalued and non-valued under various theories do not persuade the court that Receiver's proof of damages is inadequate to support the jury's award. In determining whether proof of damages is "speculative," a court must first decide whether defendant's wrongdoing proximately caused injury in fact to the plaintiff. *Aldon Industries, Inc.* v. *Don Myers & Associates, Inc.*, 517 F.2d 188, 191 (5th Cir. 1975). If so, plaintiff need not prove the extent of damages with mathematical precision. Where the wrong is of such a nature as to preclude exact ascertainment of the amount of damages, the court need only determine, second, whether the jury could have made a just and reasonable inference of the extent of damages from the evidence. *Kestenbaum* v. *Falstaff Brewing Corp.*, 514 F.2d 690, 698 (5th Cir. 1975); *Daniels Towing Service, supra,* 432 F.2d at 106.

In accordance with this framework, the court makes the primary determination that the evidence supports a finding that Moody's common law and federal securities law violations proximately caused economic injury in fact to Empire. The expert testimony by George and others cited above sufficiently establishes a causal link between the fraudulent

valuation of the trust interest, the acquisition program, and injury in fact to Empire. Moody's contention that Receiver did not adequately prove injury in fact fails for several reasons.

First, Moody misreads George's testimony. George did not rely entirely upon statutory accounting principles to show that Empire suffered economic loss. Rather, he relied upon those principles to measure the extent of Empire's economic loss as of a particular date. The import of George's testimony was that Empire's rapid acquisition of downstream assets based upon a fraudulently created surplus destined its financial ruin, measured by any accounting method, upon discovery of the fraud and the proper valuation of its surplus. Thus, he testified that the acquisition program "ultimately put Empire Life Insurance Company into a category that would classify it as insolvent, both statutorily and otherwise." (T. 544).

Second, Moody does not consider the impact of receivership upon the value of Empire's assets. The evidence amply supports a jury finding that Moody should have foreseen at the outset of the acquisition program that Empire's statutory insolvency and entry into receivership would ensue upon the devaluation of its fraudulently inflated trust interest. Therefore, the jury could properly have measured Empire's assets as of the date it entered receivership according to their value under the circumstances of receivership and not according to their value on the open market. Protective's requirement of a moratorium shows that the value of Empire's assets under the circumstances of receivership were much less than the amount of its liabilities and that Empire had suffered actual economic loss.

Third, even ignoring the impact of receivership, Moody's alternative valuations of Empire's assets do not persuade

the court that Receiver has not sufficiently proven injury in fact. This court will not order a new trial on the highly speculative basis that, if required to value Empire's assets and liabilities according to methods other than statutory accounting principles, Receiver may be unable to prove injury in fact. The record does not indicate that the alternative methods of valuation proposed by Moody are superior to statutory accounting principles and does not contain a comprehensive valuation of Empire's assets and liabilities according to such alternative method.

Having determined that Receiver sufficiently proved injury in fact to Empire, the court turns now to the question of whether he adequately proved the extent of Empire's damages. George's testimony reveals that the injury to Empire caused by the acquisition program is not susceptible of exact determination. George testified to the overall detrimental impact of the acquisition program on Empire which became "measurable" only when the trust interest was devalued. (T. 596-98). Since Empire's damages may not be precisely determined, evidence supporting a reasonable approximation will suffice. *See Kestenbaum, supra,* 514 F.2d at 698. Furthermore, since Moody had the opportunity to present to the jury alternative methods of valuing Empire's assets, it cannot now complain that the measure of Empire's damages was not more precise. *See Fattore Co.* v. *Metropolitan Sewerage Comm'n.,* 505 F.2d 1, 6 (7th Cir. 1974).

The court is of the opinion that the Receiver presented evidence from which the jury could draw a just and reasonable inference of the extent of damages suffered by Empire. George testified that insurance companies are "run and managed" and "bought and sold" according to statutory accounting principles. (T. 531-32). In estimating a range of damages ($7,000,000 — $10,000,000) caused to

Empire by Moody's wrongdoing premised upon statutory accounting principles, George presented highly probative evidence to the jury of the extent of damages suffered by Empire. The $13,000,000 ten year moratorium imposed on the cash values of insurance policies issued by Empire was additional data on which the jury could base its damage award. The jury discounted George's estimate by $2,000,000, thus compensating for inaccuracies in his method of assessment which may have inflated the extent of Empire's damages. *See Locklin* v. *Day-Glo Color Corp.*, 429 F.2d 873, 884 (7th Cir. 1970). The Seventh Circuit, in *Fattore, supra,* permitted an award of damages to stand, even though premised upon a clearly incorrect method of computing damage, because the method employed was probative of the extent of damages and the trial judge rendered a "jury type verdict" by reducing the damage figure generated by the incorrect method. It by no means being settled that statutory accounting principles incorrectly measure the damages suffered by an insurance company, this court's decision to let the jury's verdict stand is less difficult than the *Fattore* court's decision.

Since Receiver proved that Moody's wrongdoing proximately caused injury in fact to Empire and adduced evidence upon which the jury could reasonably base its award of $5,000,000 compensatory damages, the court will not set aside the jury's finding of damages.

II. 10b-5 CLAIM

Moody makes a blunderbuss attack on the jury's finding that he violated Rule 10b-5. The jury found that "the increase in the value of the trust interest from 5.8 million to 14.2 million dollars together with the acquisition program was a devise, scheme or artifice to defraud by Moody in connection with the purchase and sale of securi-

ties," Charge, Question No. 6, and "an act, practice or course of conduct by Moody which operated as a fraud or deceit upon any person in connection with the purchase or sale of securities." Charge, Question No. 7. The jury also found that "Moody's failure to state that the trust interest was intended by Moody to be non-transferable by Empire was an omission to state a material fact necessary to make his representations about the value and admissibility of the trust interest not misleading and was omitted with the intent to deceive or defraud in connection with the purchase or sale of securities." Charge, Question No. 8. It found, in response to Question No. 9, that these violations of Rule 10b-5(1), (2), and (3) were a proximate cause of damages to Empire's stockholders "capital and surplus", and, in response to Question 16, that such damages amounted to $5,000,000. Moody contends that these findings, in light of the instructions given to the jury, do not state a violation of Rule 10b-5. The court will examine seriatim the elements of a 10b-5 action to determine whether the jury's findings in light of the court's instructions support the entry of judgment on Receiver's 10b-5 claim.

The basic elements of a 10b-5 action are: (1) conduct by the defendant proscribed by the rule; (2) a purchase or sale of securities by the plaintiff in connection with such proscribed conduct, and (3) resultant damages to the plaintiff. *Woodward* v. *Metro Bank of Dallas,* 522 F.2d 84, 93 (5th Cir. 1975).

Proscribed Conduct

Recent Supreme Court decisions have refined the sort of conduct proscribed by Rule 10b-5. Only conduct which can be fairly viewed as manipulative or deceptive is covered by Rule 10b-5. *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462, 473-74 (1977). A person who engages in

deception in connection with the purchase or sale of a security does not violate Rule 10b-5 unless he intends to deceive the buyer or seller of the security. *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185 (1976). Thus, a person who imparts false information to a buyer or seller of a security violates Rule 10b-5 if he knows of the falsity of the information or acts in reckless disregard of its falsity. *First Virginia Bankshares* v. *Benson,* 559 F.2d 1307, 1314 (5th Cir. 1977).

Although Questions 6 and 7 to the jury differ in wording in accordance with the differing language of subsection (1) and (3) of Rule 10b-5, they essentially inquire whether Moody has engaged in deceptive conduct. *See Santa Fe, supra,* 430 U.S. at 473-74; 1 A. Bromberg, Securities Law: Fraud, §2.6(1) at 49 (1977). The evidence more than adequately demonstrates that Moody employed deceit to increase the value of the trust interest from 5.8 million dollars to 14.2 million dollars. Empire's Annual Report of 1965, DX 7, first announced to Empire's shareholders a valuation of $14,213,440 for Moody's trust interest. Empire's annual report for the previous year had stated a valuation of $5,813,440 for the trust interest. DX 9. The 1965 annual report stated that "[v]aluation of the trust was calculated by the national auditing firm of Ernst & Ernst and actuaries including Mr. Lloyd K. Friedman, F.S.A., consulting actuary of Houston." DX 7, at p. 7. Ernst and Ernst, however, had not "calculated" the $14,213,440 value for the trust interest. Rather, it had approved the method employed by Lloyd K. Friedman (Friedman) to calculate the value of the two-fifth's of Moody's trust interest assigned to Empire at $5,813,440. DX 16, PX 35. The data underlying the trust valuation came from Moody and Friedman, not from Ernst & Ernst, in contradiction to the clear import of the statement that

Ernst & Ernst calculated the value of the trust interest. Furthermore Friedman employed a different method to calculate the value of Moody's trust interest at $36,084,000. DX 74. Under all the circumstances the jury could readily conclude that Moody deceived Empire's shareholders into believing that the increased value of the trust interest formed a solid foundation to support the acquisition program, when in reality the $14,213,440 value and shaky underpinnings.

The wording of Questions 6 and 7 implies an inquiry into Moody's intent to defraud Empire's shareholders. *See Ernst & Ernst, supra.* In connection with Question No. 6, the court defined "a device, scheme or artifice to defraud" as embracing an intent to deceive. Charge at 20. Since the evidence supports a finding that Moody intended to deceive Empire's shareholders as to the basis for the trust valuation, the jury's answers to Question No. 6 and 7 establish the element of "scienter" in Receiver's 10b-5 claim.

The court correctly defined "materiality" for [illegible] of Question No. 8, Charge at 20. *TSC Industries, Inc. v. Northway, Inc.*, 462 U.S. 438, 449 (1976); *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 603-04 (5th Cir. 1974). Under the evidence, the jury could reasonably find that Moody's omission to state that the trust interest was non-transferable was material and made with intent to deceive Empire's shareholders as to the value of the trust interest.

Moody contends that even if he deceived Empire's shareholders when he increased the trust valuation, he did not deceive Empire, for whom Receiver seeks recovery. The jury's finding that Moody dominated the business policy of Empire until at least March 21, 1970, by virtue of his power to nominate and elect a majority of the Board of Directors of Empire forecloses a finding that Moody deceived the Board of Directors in order to effectuate the acquisition

program. Charge, Question 15; *See Superintendent of Insurance* v. *Banker's Life and Casualty Co.*, 404 U.S. 6, 7 n. 1(1971). Since a majority of the board of directors carries on the business of a corporation and its knowledge is imputed to the corporation adherence to corporate formalism requires the conclusion that if a majority of board of directors of a corporation is not deceived the corporation is not deceived. The Fifth Circuit, however, has rejected this position as incompatible with the remedial purposes of Rule 10b-5. *Shell* v. *Hensley,* 430 F.2d 819, 826-27 (5th Cir. 1970); *Rekant* v. *Desser,* 425 F.2d 872, 878 n. 14 (1970). *Shell* did not articulate the "deception" involved when a majority of the board of directors of a plaintiff corporation authorizes a securities transaction with knowledge of the fraud connected with the transaction. The court perhaps relied instead upon the "new fraud" approach rejected by the Supreme Court in *Santa Fe. See Schoenbaum* v. *Firstbrook.* 405 F.2d 215 (2d Cir. 1968), *cert. denied,* 395 U.S. 906 (1969); Note, *Suits for Breach of Fiduciary Duty Under Rule 10b-5 After Santa Fe Industries, Inc.* v. *Green,* 91 Harv. L. Rev. 1874, 1882 n. 49 (1978). Although *Santa Fe* does not overrule *Shell,* it at least calls for an articulation of the deception suffered by a corporation when a majority of its directors participate in the deception. *See Goldberg* v. *Meridor,* 567 F.2d 209, 217-18 (2d Cir. 1977), *cert. denied,* 435 U.S. 956 (1978). The Third Circuit, prior to *Santa Fe,* theorized that when a majority of the board of directors participates in a deception proscribed by Rule 10b-5, the shareholders become the corporate entity for purposes of being deceived. *Pappas* v. *Moss,* 393 F.2d 865, 869 (3d Cir. 1968); *see Goldberg,* 567 F.2d at 217 (reaffirming theory of constructive deception); Note, 91 Harv. L. Rev. 1874, 1883, (1978) (principles of agency law and nature of a shareholders derivative suit are theoretical bases for "constructive deception" of a corporation through

minority shareholders. The Fifth Circuit appears to have adopted this theory of "constructive deception." In *Miller* v. *San Sebastian Gold Mines, Inc.*, 540 F.2d 807 (5th Cir. 1976), it held that a corporation could bring a 10b-5 action even though all the directors and shareholders of the corporation participated in the fraud. The persons deceived, according to the court, were the future shareholders of the corporation, who were the intended victims of the fraud.

This court instructed the jury that Empire's shareholders were among the persons whom Moody may have deceived in inflating the trust interest, Charge at 20-21, and related to the jury Receiver's contention that Moody deceived Empire's shareholders. Charge at 18. The jury's answers to Question 6, 7, and 8, therefore, can reasonably be construed as findings that Moody deceived Empire's minority shareholders. Under the theory of constructive deception, the jury's findings that Moody deceived minority shareholders of Empire[2] constituted findings that Moody so deceived Empire.

Purchase or Sale of Securities in Connection With Proscribed Conduct

The second basic element of a 10b-5 action seeks to establish a causal link between the conduct prescribed by rule 10b-5 — the intentional deception — and the purchase or sale of a security. In this case that causal link is between Moody's deceptive practices concerning the value of the trust interest and the acquisition program. The acquisition program involved three types of transactions: mergers; outright purchases of shares in other corporations; and purchases of blocks of life insurance policies through bulk

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2. Although Moody originally owned 100% of Empire's stock (T. 579, DX 43), various mergers created minority shareholders in Empire prior to the deceptions practiced in the 1965 annual report in connection with the increase in value of Moody's trust interest.

reinsurance agreements. (T. 575, 578, 785-88). Each time Empire merged with a corporation it purchased and sold securities. *See Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 590 (5th Cir. 1974). Empire's outright purchases of shares in other corporations were clearly the purchases of securities. Empire's purchases of blocks of life insurance were not, however, the purchases of securities. The significance of this fact will be explored later. For purposes of this discussion, it need only be stated that the acquisition program involved purchases and sales of securities.

The Fifth Circuit has broken down the proof of a causal link between the proscribed conduct and the purchase or sale of a security into the proof of two separate but overlapping elements: (1) actual reliance by the plaintiff upon the defendant's deceptive practices in deciding whether to purchase of sell a security; and (2) deceptive practices by defendant "in connection with" plaintiff's purchase or sale of securities. *See Rifkin* v. *Crow*, 574 F.2d 256 (5th Cir. 1978); *Moody, supra; First Virginia Bankshares* v. *Benson*, 559 F.2d 1307 (5th Cir. 1977); *Dupuy* v. *Dupuy*, 551 F.2d 1005 (5th Cir. 1977). The existence of a separate reliance element raises a question whether Receiver may recover judgment on his 10b-5 claim if the jury did not expressly find that Empire's shareholders relied upon Moody's deceptions concerning the value of the trust interest in assessing the propriety of the acquisition program. It is presumed that Empire's shareholders relied upon Moody's omission concerning the transferability of the trust interest. *See Rifkin, supra*, 574 F.2d at 262. Since the court instructed the jury that it should find "a device, scheme, or artifice to defraud" only if the device, scheme or artifice to defraud operated to deceive "persons who would predictably rely thereon," the jury's answer to Question No. 6 conceivably encompasses a finding of actual reliance upon Moody's affirmative misrepresentation concerning the value of the

trust interest. Even assuming the jury's answers to Questions No. 6, 7, and 8 do not include a finding of actual reliance, however, its answer to Question No. 9 necessarily involves a finding of actual reliance on Moody's misrepresentation. The jury could not have found that Moody's securities violations proximately caused damages to Empire without finding that Empire's shareholders actually relied upon those violations. *See Rifkin, supra,* 574 F.2d at 262 (reliance requirement "simply requires there to be a causal link between defendant's violation and plaintiff's harm in order for plaintiff to recover"). Whereas a finding of reliance does not necessitate a finding of causation, *see Moody, supra,* the converse is not true. If there is evidence to support the jury's finding of proximate cause, the element of reliance has been satisfied.

The jury's proximate cause finding also obviates the need for a separate finding that Moody's securities violations were "in connection with" the purchase or sale of a security. The Fifth Circuit may give "in connection with" a loose causal interpretation. In *First Virginia Bankshares, supra,* the court quoted the following formulation of the "in connection with" requirement from *List* v. *Fashion Park, Inc.,* 340 F.2d 457 (2d Cir. 1964): "whether the plaintiff would have been influenced to act differently than he did act if the defendant had disclosed to him the undisclosed fact." 559 F.2d at 1315. *See Wilson* v. *First Houston Investment Corp.,* 566 F.2d 1235, 1243 (5th Cir. 1978) (any purchase and sale of security "too remote" to satisfy "in connection with" requirement). *But see Superintendent of Insurance, supra,* 407 U.S. at 12-13 (corporation which suffers an injury as a result of deceptive practices "touching" its sale of securities entitled to recover under Rule 10b-5). *See generally* Note, *The Pendulum Swings Farther: The "In Connection With" Requirement and Pretrial Dismissals of Rule 10b-5 Private Claims for Damages,* 56 Texas L. Rev.

62 (1977). One commentator construes *Santa Fe, supra* 430 U.S. at 474 n. 14, as requiring, in the context of 10b-5 suits premised on "constructive deception" of shareholders, a causal link between the deception and the challenged securities transactions. Note, 91 Harv. L. Rev. 1874 (1978). This link is satisfied, the commentator argues, if the deception practiced by corporate directors upon shareholders precludes a shareholder's derivative suit to enjoin the securities transactions, regardless of whether such a suit would succeed. *See Goldberg, supra.* Although the definition of "in connection with" is in flux, one can safely assume that it does not entail a degree of causation more rigorous than proximate causation. *Cf. First Virginia Bankshares,* 559 F.2d at 1314 n.4. A priori, the "in connection with" requirement is met if there is evidence to support the jury's answer to Question No. 9.

The court is of the opinion that the jury had before it adequate evidence upon which to base its finding of proximate causation. The jury could readily find that the deceptive description of the Moody trust interest in Empire's Annual Report of 1965 had considerable impact upon Empire's minority shareholders. *See Rifkin, supra,* 574 F.2d at 261 n. 1. It could conclude that, had shareholders known of the shaky foundation upon which the increase in the value of the trust interest rested, they would have taken steps to halt the acquisition program. (T. 542-43). Since Moody could not have implemented the acquisition program but for the increase in value of the trust interest, shareholders could have halted the program by publicizing the facts surrounding the increase in value. The jury could reasonably conclude that dessimination of these facts to companies targeted by Empire for merger and to persons approached for non-cash sales of controlling shares in corporations would foil such transactions and lead to the

abandonment of the whole acquisition program. The jury could also have found that shareholders could have halted the acquisition program through a court injunction based on the same mismanagement and breach of fiduciary duty claims brought by the Receiver and decided by the jury that very day. *See Goldberg, supra.* There being adequate evidence to support the jury's finding that Moody's securities law violations proximately caused the acquisition program, the second basic element of Receiver's Rule 10b-5 action has been established.

Due Diligence

The Fifth Circuit requires that a plaintiff seeking recovery under Rule 10b-5 prove his "due diligence" as an element distinct from the actual reliance requirement. *Dupuy, supra; Clement A. Evan & Co.* v. *McAlpine,* 434 F.2d 100 (5th Cir. 1970). Under *McAlpine,* a plaintiff established his due diligence by proving that his reliance upon defendant's deceptive practices was reasonable under all the circumstances existing at the time of the deceptive practices. 434 F.2d at 103-04. *Dupuy,* a decision handed down after this case was submitted to the jury, announced a less stringent due diligence requirement responsive to the Supreme Court's holding in *Ernst & Ernst, supra.* Under *Dupuy* a plaintiff did not exercise due diligence if he intentionally refused to investigate in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. 551 F.2d at 1020.

Moody contends in his Memorandum of Law at p. 47 that Receiver may not recover on his 10b-5 claim because the jury did not make a finding of due diligence. The jury's finding in response to Question No. 14, although in the context of Moody's statute of limitations defense, would seem to establish Empire's due diligence under *Dupuy.* The jury

found that Empire's shareholders other than Moody did not have knowledge of facts that would have caused a reasonably prudent person to make inquiry which would have led to a discovery before March 21, 1969, of the material circumstances surrounding the increase in carrying value of the trust interest and the acquisition program. To make this finding, the jury must have concluded that Empire's minority shareholders did not intentionally refuse to investigate a known or obvious risk concerning the value of the trust interest so great as to make it highly probable that harm would follow. Since, however, Moody had the burden of proving the shareholders' unreasonable delay in discovering Receivers' claims in Question No. 14, and Receiver would have the burden of proving due diligence, the jury's answer to Question No. 14 may not discharge Receiver's duty to establish due diligence.

The jury's failure to make a finding of due diligence, however, does not necessitate a new trial. Moody did not request an interrogatory or instruction to the jury concerning Empire's shareholders' due diligence in assessing the value of the trust interest and did not object to the omission from the charge of the issue of due diligence.[3] Under these circumstances F.R.Civ.P. 49(a) authorizes the court to make a finding on the issue of due diligence. Accordingly, the court finds that Empire's minority shareholders did not intentionally refuse to investigate a known or obvious risk concerning the value of the trust interest so great as to make it highly probable that harm would follow.

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3. At the time of this case, *McAlpine* had clearly established a due diligence requirement. That *Dupuy* altered the content of the requirement did not relieve Moody of the duty to object to the omission of the issue from the Charge if it wished to preserve its right to a jury determination.

Resultant Damages to the Plaintiff

The third basic element of a 10b-5 action concerns the causal link between the securities transactions caused by the defendant's proscribed conduct and the loss suffered by the plaintiff. *But see Moody, supra* (under one interpretation causal link between deceptive practice and loss is required; even though defendant's misrepresentation induced plaintiff to purchase a security — a discretionary account in commodities futures contracts — defendant not liable for losses incurred in trading of particular futures because plaintiff consented to such trading). The jury's answers to Question No. 9 and 10, adequately supported by the evidence, establish a causal link between Moody's deceptive practices and Empire's loss. In meeting the more stringent causation requirement that is one interpretation of *Moody*,[4] this jury finding establishes a causal link between the acquisition program and Empire's loss, thus satisfying the third basic element of a 10b-5 claim.

In the previous section the court upheld the jury's finding of $5,000,000 compensatory damages based upon evidence that the acquisition program caused damages amounting to at least that much. Having found that Moody breached common law duties owed to the corporation by implementing the acquisition program, the jury reasonably

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4. *Moody*, 570 F.2d at 572 n. 7 expressly denies that it is requiring anything more than proof of "transaction causation": a causal link between the defendant's deceptive practices and plaintiff's securities transactions. One possible interpretation of the court's decision which conforms with this denial is that, since the plaintiff consented to the trading of those futures which resulted in his loss, he would have entered into those transactions regardless of whether he had "purchased" the discretionary commodities account from the defendant. A third interpretation of *Moody* is that at the time of the futures trading which caused plaintiffs' losses defendant's misrepresentation was no longer material. 570 F.2d at 528.

considered the loss attributable to the acquisition program in calculating the damages recoverable on Receiver's common law claims. It is more problematic, however, to permit the jury's finding of damages recoverable on Receiver's securities law claims to stand if premised also on the loss to Empire caused by the acquisition program. Moody violated the securities laws only in connection with transactions in the acquisition program which were purchases or sales of securities. He did not violate the securities laws when Empire purchased blocks of life insurance from other companies. If the jury considered the whole acquisition program in determining the damages caused by Moody's securities law violations, it took into account losses caused by transactions other than purchases or sales of securities. The court must determine, first, whether the jury did consider the purchases of blocks of life insurance in assessing damages for Moody's securities law violations and, if so, second, whether the jury erred in considering those transactions.

The court instructed the jury that the bulk insurance transactions were not securities transactions. Charge at 20. It did not, however, instruct the jury that it was not to take the bulk insurance transactions into account in assessing damages for Moody's securities law violations. Rather, the court stated the Receiver's contention in connection with his 10b-5 claim that the acquisition program embarked upon by Moody was the proximate cause of the ultimate damage to Empire Charge at 18. It is doubtful that the jury found identical damages for Moody's breach of common law duties and for his securities law violations and omitted consideration of the bulk insurance transactions in assessing damages on the securities law claims. As no evidence was introduced to show the loss to Empire caused by the acquisition program less the bulk insurance trans-

actions, it is even more unlikely that the jury made such a finding in response to Question No. 10.

The court is of the opinion that the jury did not err in taking into account the bulk insurance transactions in assessing damages for Moody's securities law violations. The jury could reasonably have determined that Moody would not have engaged in the acquisition program at all if he had been unable to enter into the securities transactions forming the basis for Receiver's 10b-5 claims. Thus it could have found that Moody's securities law violations caused the entire acquisition program which caused a loss to Empire of $5,000,000. Even if the securities law violations did not cause the bulk insurance transactions, the jury was entitled to consider those transactions in determining damages on Receiver's 10b-5 claims. As discussed above, the transactions constituting the acquisition program are inextricably bound with reference to Empire's loss. No one kind of transaction caused Empire's loss. To require proof that the securities transactions alone caused Empire's loss and proof of the extent of that loss would foreclose Receiver's 10b-5 claims. It should be Moody's burden to prove what amount of Empire's loss, if any, is not attributable to his violations of Rule 10b-5. *See Daniels Towing Service, supra.* Since Moody presented no such evidence in mitigation of Empire's loss, the jury was entitled to charge him with the loss attributable to the entire acquisition program.

For the reasons set forth above, the court is of the opinion that the jury's findings support the entry of judgment on Receiver's 10b-5 claims in the amount of $5,000,000.

III. ESTOPPEL

Citing *Bangor Punta Operations, Inc.* v. *Bangor and Aroostock R.R.*, 417 U.S. 307 (1974), Moody contends that Receiver is equitably estopped from bringing this suit on behalf of Empire because the proceeds of the suit will go to Protective under the Fourth Amendment to Treaty of Assumption and Bulk Reinsurance (Treaty), PX 73. The decision in *Bangor Punta* turned on the equitable principle that a purchaser of all, or nearly all, of a corporation's shares may not sue his seller for corporate mismanagement. 417 U.S. at 425. If permitted to recover from his seller, the purchaser would obtain a windfall, assuming he paid the fair market value of the shares, and would, in effect, recover his purchase price from the seller. 417 U.S. at 425-26. Finally, recovery would permit the seller to profit from the wrongs done to others and thus would encourage further such speculation. *Id.*

Bangor Punta does not compel dismissal of this suit on its facts or on its principles. Protective did not purchase any shares of Empire. Rather, it acquired most of Empire's its assets and liabilities under a bulk reinsurance agreement after Empire had been adjudicated involvent and placed in receivership. The assets transferred to Protective expressly did not include the causes of action sued upon in this case. Since Protective acquired an insolvent company, it required a moratorium on the cash values of insurance policies issued by Empire. The proceeds of this suit will be received by Protective and applied to reduce the Moratorium Amount established in the bulk reinsurance agreement. Treaty at 2. They will not be a windfall for Protective. Protective will not thereby recover the "purchase price" of Empire. Finally, it will not profit from wrongs done to others. It flies in the face of equity for Moody to argue that he may avoid compensating Empire

for the loss he caused it because the Receiver has chosen to benefit the creditors of Empire with the proceeds of this suit.

IV. McCARRAN-FERGUSON ACT

Moody contends that the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) forbids Receiver's 10b-5 claims because they involve the construction of an Act of Congress that would "invalidate, impair or supercede" Alabama law regulating the accounting of insurance companies and hence the "business of insurance." Even assuming that the Alabama law which regulates the accounting of insurance companies concerns the "business of insurance" because it is designed to protect the security of policyholders, *see SEC* v. *National Securities, Inc.*, 393 U.S. 453, 461-62 (1969), Receiver's suit under the Securities Exchange Act of 1934 does not "invalidate, impair, or supercede" such law. In *National Securities, supra,* the Supreme Court held that the state law under which an insurance commissioner approved a merger between two insurance companies was not impaired by a SEC action to enjoin the merger. According to the Court, the insurance commissioner viewed the merger from the standpoint of its impact on policyholders and the SEC sought to protect the shareholders of the companies from misrepresentations made in connection with the merger. Since the Court had determined that shareholder protection did not involve the business of insurance, it concluded that the SEC's suit would not impair the law under which the insurance commissioner approved the merger, even though, if successful, it would undo the merger.

In this case, the Receiver's suit seeks recovery for losses caused by securities transactions entered into as a result of Moody's deceptive practices in connection with the valuation of the trust interest. Empire's purchases of securities

were not the "business of insurance" because they did not directly involve the relationship between the insurance company and its policyholders. *See Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 47 U.S.L.W. 4203 (February 27, 1979); *National Securities, supra.* Unlike the facts of *National Securities*, recovery by Receiver on his 10b-5 claim would not even have required that the Alabama Insurance Commissioner revise the value at which Empire holds Moody's trust interest. Federal securities law merely required full disclosure of the facts surrounding the valuation of the trust interest for the benefit of the corporation's investment decisions. It did not impair the Alabama Insurance Commissioner's valuation of Empire's assets in accordance with statutory accounting principles for the benefit of Empire's policyholders. As in *National Securities, supra*, 393 U.S. at 463, there was no conflict.

V. OTHER GROUNDS OF ERROR

Several grounds of error asserted by Moody have already been considered by the court and do not require reconsideration. The remaining grounds can be quickly disposed of.

The court is of the opinion that sufficient evidence supports the jury's findings in response to Questions No. 14-17. The evidence also adequately demonstrates Moody's responsibility for the liability producing acts found by the jury. The forms of the interrogatories submitted to the jury are not confusing or misleading. The jury did not award punitive damages for Moody's securities law violations. Rather, its award of $1,000,000 punitive damages in response to Question No. 12 is tied to its finding of Moody's breach of common law duties in Question No. 3. The court did not submit a damage issue to the jury with respect to Question No. 4 because the damages suffered by Empire

as a result of Moody's self-dealing did not present an issue of fact. The evidence shows that, as a result of Moody's self-dealing, Empire transferred on July 1, 1971, over $319,000 to W. C. Moody Bankers (PX 70) and received nothing in return. All other grounds of error raised by Moody are overruled.

VI. CONCLUSION

In accordance with the jury's verdict the court shall enter judgment on Receiver's self-dealing claim in the amount of $319,000. It shall also enter judgment on his mismanagement and breach of fiduciary duty claims and on his 10b-5 claims in the amount of $5,000,000. Further, the court shall enter judgment for punitive damages on Receiver's mismanagement and breach of fiduciary duty claims in the amount of $1,000,000. Under Texas law, the court is required to award pre-judgment interest as damages on Receiver's common law claims if the principal damages are determinable and established at a definite time either by rules of evidence or known standards of value. *McDaniel* v. *Tucker,* 520 S.W.2d 543, 549 (Tex. Civ. App. — Corpus Christi 1975, *no writ*); *Colonial Refrigerated Transportation, Inc.* v. *Mitchell,* 403 F.2d 541, 554 (5th Cir. 1968). *But see Phillips Petroleum Co.* v. *Adams,* 513 F.2d 355, 366 (5th Cir.) *cert. denied,* 423 U.S. 930 (1975). The damage to Empire caused by Moody's self-dealing became definite and ascertainable on July 15, 1971, when Empire funds were transferred to W. L. Moody Bankers. The damages suffered by Empire as a result of Moody's mismanagement and breach of fiduciary duty became definite and ascertainable as of the date of Receivership, July 1, 1972. Accordingly, the court shall award pre-judgment interest on Receiver's common law claims from these dates. One question remains: at what rate of interest shall prejudgment interest be awarded?

Unfortunately, the Texas law is not clear. *Watkins* v. *Junker,* 90 Tex. 584, 40 S.W. 11 (1897) stated that "the courts have, by analogy, adopted the legal rate of interest fixed by statute as the standard by which to be governed in assessing damages for the detention of money." Texas law provides for two legal rates of interest. Tex. Rev. Civ. Stat. Ann., art. 5069-1.03 allows pre-judgment interest on "written contracts ascertaining the sum payable" and on open accounts at the rate of six percent. Since September 1, 1975, Tex. Rev. Civ. Stat. Ann., art. 5069-1.05 has provided for post-judgment interest at the rate of nine percent. In a Memorandum Opinion and Order entered November 29, 1978, in *Hadra* v. *Herman Blum Consulting Engineers,* CA-3-75-1041-D, this court determined that pre-judgment interest as damages should be awarded at a rate of six per cent. A review of the case law revealed no discussion of the issue of which rate to apply, but uncovered applications of both the nine per cent and the six percent rates. *See Earl Hayes Rents Cars & Trucks* v. *City of Houston,* 557 S.W.2d 316, 322 (Tex. Civ. App. — Houston [1st Dist.] 1977, writ ref'd n.r.e.); *City of Ingleside* v. *Stewart,* 554 S.W.2d 939, 946-47 (Tex. Civ. App. — Corpus Christi, 1977, *no writ*). Resorting to the language of *Watkins,* this court concluded that art. 5069-1.03 provided the more appropriate analogy for prejudgment interest as damages because it provides specifically for prejudgment interest. Furthermore, to award pre-judgment interest as damages at a rate of nine per cent would emasculate art. 5069-1.03. As stated in *Hadra, supra,* the court feels bound to apply a six percent rate to pre-judgment interest awarded as damages until the Texas legislature remedies the disparity in legal rates of interest or the Texas courts resolve the issue of which rate to apply.

The court is not bound by state law in determining whether to award pre-judgment interest on Receiver's securities law claims. Whether to award pre-judgment interest is a question of fairness resting within the district court's sound discretion, *Wolf* v. *Frank,* 477 F.2d 467, 479 (5th Cir. 1973). Under the circumstances of this case, the court is of the opinion that Receiver should be awarded pre-judgment interest at the rate of six per cent from the date of Receivership, July 1, 1972. Moody's personal wrongdoing was established by the jury's findings. *See Norte & Co.* v. *Huffines,* 416 F.2d 1189, 1191-92 (2d Cir. 1969). Further, Empire was deprived of the opportunity to invest the $5,000,000 awarded by the jury as damages. *Id.* at 1192. Finally, Moody is at least as responsible as Receiver for the time elapsed in bringing this suit to judgment. *Id.* Moody's voluminous post trial briefs attest to that.

Defendant's motions are denied; it is so ORDERED.

Dated this 29th day of May, 1979.

United States District Judge

APPENDIX C

United States Court of Appeals

FOR THE
FIFTH CIRCUIT

No. 80 - 1145

D.C. DOCKET NOS. CA-3-5678-D AND CA-3-7625-D

DAVID C. MEYERS, *Et al.*
Plaintiffs-Appellees

v.

SHEARN MOODY, JR.
Defendant-Appellant

BERNARD HAINES, *Et al.*
Plaintiffs-Appellees

v.

SHEARN MOODY, JR.
Defendant-Appellant

THORPE FORRESTER,
Receiver-Appellee

v.

SHEARN MOODY, JR.
Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF TEXAS

BEFORE THORNBERRY, REAVLEY and JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by Counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed;

It is further ordered that defendant-appellee pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

December 23, 1982

Issued as mandate: March 28, 1983

APPENDIX D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 80-1145

DAVID C. MEYERS, *et al.*,
Plaintiffs-Appellees,

v.

SHEARN MOODY, JR.,
Defendant-Appellant,

BERNARD HAINES, *et al.*,
Plaintiffs-Appellees,

v.

SHEARN MOODY, JR.,
Defendant-Appellant,

THARPE FORRESTER,
Receiver-Appellee,

v.

SHEARN MOODY, JR.,
Defendant-Appellant,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 12/23/82, 5 Cir., 198 , ... F.2d .....).

(March 1, 1983)

Before THORNBERRY, REAVLEY and JOHNSON, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

Entered For The Court:

/s/ THOMAS M. REAVLEY
United States Circuit Judge